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Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 233.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, *Plaintiff in Error,* **vs.** **FIRST NATIONAL BANK OF GENESEO, ILLINOIS,** *Defendant in Error.*	**Error to the Supreme Court of the Territory of Oklahoma.**

REPLY OF PLAINTIFF IN ERROR TO BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 284.

NATIONAL LIVE STOCK BANK OF CHICAGO, ILLINOIS, *Plaintiff in Error,* *vs.* **FIRST NATIONAL BANK OF GENESEO, ILLINOIS,** *Defendant in Error.*	**Error to the Supreme Court of the Territory of Oklahoma.**

REPLY OF PLAINTIFF IN ERROR TO BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

I.

JURISDICTION.

Counsel for the defendant in error deny the jurisdiction of this court, because:

(a) The case is here by writ of error rather than by appeal, and,

(b) They insist the statute has not been complied with in that there is no special finding of facts.

A.

This is an action in replevin, tried in the District Court of the Territory of Oklahoma, without the intervention of a jury; the jury by written stipulation being waived. (Rec., 34-35.) The amount in controversy exceeds $14,000.

That the case is properly here by writ of error is concluded by *Comstock* v. *Eagleton*, 196 U. S., 99; *Oklahoma City* v. *McMaster*, 196 U. S., 529; and *Guss et al.* v. *Nelson*, decided by this court January 15, 1906.

B.

Counsel say:

> "Of course it goes without saying that the Oklahoma Supreme Court when it delivered its opinion never supposed that it was making a finding of facts in the nature of a special verdict in the case." (Br., 7-8.)

In this contention, counsel are clearly erroneous. In rendering the opinion and judgment of the Supreme Court of the Territory of Oklahoma on the second appeal, Judge Burwell said (Rec., 139):

> "This case was originally tried in the District Court of Woodward County, and judgment rendered in favor of the National Live Stock Bank of Chicago. The First National Bank of Geneseo appealed, and this court reviewed the record, and promulgated an opinion, in which it made a *full statement and finding of facts*, and enunciated the law as applied thereto, reversing judgment of the lower court, and remanded the case, directing a new trial—76 Pac., 130.
>
> "On the second trial in the lower court it was

> agreed between the parties that a jury be waived and the case submitted to the court as made on the first trial. Judgment was rendered in favor of the Genesco Bank, and the Chicago Bank appeals to this court. No new question is raised on this appeal. The record is the same as stated in our former opinion, and we are fully satisfied with the law as therein declared."

It thus appears that the Supreme Court of the Territory of Oklahoma *did* suppose that it was making a finding of facts, for it specifically and emphatically so declared. Nor was the Supreme Court of the Territory content to say that it made a finding of facts, or a statement of facts, or a statement and finding of facts; but in order that its statement and finding of facts might not be drawn in question thereafter, it specifically and emphatically declared its statement and finding of facts to be "a *full* statement and finding of facts." We submit the emphatic declaration of the Supreme Court of the Territory of Oklahoma, that it made "a full statement and finding of facts," is a compliance with counsel's own construction of the statute.

But ignoring the full statement and finding of facts the argument that the record contains no special finding of facts by the Supreme Court of Oklahoma is unavailing for the following reasons:

1. Sections 649 and 700 of the Revised Statutes of the United States, are as follows:

> "Sec. 649. Issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the

facts, which may be either general or special, shall have the same effect as the verdict of a jury.

"Sec. 700. When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, according to Section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment."

The record contains a case-made, which, under the Oklahoma practice, is a bill of exceptions.

The release of the chattel mortgage securing the notes of the Geneseo Bank was offered in evidence at the trial, objected to by the counsel for that bank, admitted by the court over the objection, and exception to the ruling duly taken.

Thus under the statute, the effect of the release so admitted in evidence over the objection and exception of the defendant in error, as shown by the bill of exceptions, is before this court for consideration.

In the examination of Manfred Brown, Register of Deeds of Clark County, Kansas (Rec., 53), he was asked concerning the release, which was designated as "Exhibit C" to his deposition. When the release was handed to the witness by counsel for the Chicago Bank, counsel for the Geneseo Bank objected as follows:

"I object to any testimony concerning "Ex-

hibit C" for the reason that the same is incompetent, irrelevant and immaterial,"

and

"further, not binding on the defendant; the signature is not shown to be genuine, is not properly executed, is not acknowledged and is not witnessed."

The trial court held that the release was sufficiently identified, and the release was then read in evidence (Rec., 97). Later (Rec., 64), the release, as "Exhibit C" was formally offered in evidence, and was attached to the testimony of the witness Brown as a part thereof, over the objection of the counsel for the Geneseo Bank.

"Defendant objects to the introduction of 'Exhibit C' (the release) for the reason that the signature has not been shown to be genuine, and is not properly executed, and is not acknowledged, is not witnessed, and is incompetent, irrelevant and immaterial." (Rec., 64.)

Again, during the testimony of H. A. Suttman (Rec., 71), counsel for the Chicago Bank referred to the release and asked the witness to identify the signature thereto. After the signature was identfied, counsel offered the release, to which offer counsel for the Geneseo Bank said:

"We object to the introduction of that in any form or manner, as incompetent, irrelevant and immaterial and not binding on the defendant."

The court said:

"It may go in evidence with the right to reserve and determine its competency afterwards."

W. B. Grimes, Jr. (Rec., 79), identified the signature of Frank Siegel to the release. He was asked when

he first saw "Exhibit C" (the release), which was objected to by counsel for the Geneseo Bank, which objection the court sustained, to which ruling of the court counsel for the Chicago Bank excepted. (Rec., 81.)

No question was raised concerning the admission in evidence of the release after it was admitted The Supreme Court of the Territory did not review the ruling on the admissibility of the release in evidence. In that court we advanced no argument on the question in our original brief, and counsel for the Geneseo Bank did not question the admissibility of the release in their brief. From the beginning of this case, the whole contention has been, not on the admissibility in evidence of the release, but on the legal *effect* of the release after it is in evidence. Counsel for the Geneseo Bank, on page 26 of their brief say:

> "The contention here will be over the effect of this release."

And on page 41 of their brief they say under point VII:

> "The release of the mortgage of the Geneseo Bank was void because the same was not acknowledged. It was improperly recorded for that reason. What is said by the Supreme Court of Okalahoma in its opinion in this case, commencing at page 147 of the printed record herein, fully covers this point."

We submit that by adopting the language of the Supreme Court of the Territory, and their argument on the effect of the release, counsel concede that the release was good as between the mortgagor Grimes, and the Commission Company, the party holding the

record title, for in its opinion, the Supreme Court of the Territory said:

> "And even if the Chicago Bank had examined this release it was bound to know that it was not in form and would not be binding *except as between Grimes and the Siegel-Sanders Company. As between them it was simply an acknowledgement of the payment of the debt.*"

Notwithstanding the opinion of the Supreme Court of Oklahoma, we insist that the release was entitled to record, because the undisputed testimony of the witness Sargent, a Kansas lawyer learned in the law (pages 46, 47, 48 of our original brief), shows that the release was good between the parties of record, and the *Drumm-Flato* case (page 48 of our original brief) shows that such releases are passing through the courts of Kansas without question. This, with the admission of counsel for the Geneseo Bank that the release was good between the parties of record makes further argument in addition to our original brief commencing page 43, unnecessary. When the debt secured by the mortgage was paid, as the release clearly showed, the mortgage died with it as between the parties on the record.

(2) All of the material facts in this record were stipulated by the parties.

In the Supreme Court of Oklahoma, and in this court, we have assumed that all the facts so stipulated would be given full faith and credit. Counsel for the Geneseo Bank have proceeded on the same assumption. On pages 20, 21, 22, 23, 24 and 25 of their argument, they have specificially set out these stipulations, have called the attention of the court thereto, and

requested this court to consider the same. The court has uniformly held that agreed facts will have the same force and effect as a special finding of facts.

In *Insurance Co.* v. *Tweed,* 7 Wall., 44, counsel agreed that certain facts recited in the opinion of the court were the material facts in the case, and this court treated them as facts found by the court. Mr. Justice Miller, in delivering the opinion, said (p. 51):

> "But the counsel for both parties in this court have agreed to certain parts of that opinion as containing the material facts of the case, and to treat them here as facts found by the court; and inasmuch as they could have made such an agreement in the court below, we have concluded to act upon it here as if it had been so made."

In *Supervisors* v. *Kennicott,* 103 U. S., 554, the court speaking through Chief Justice Waite, said (p. 556):

> "2. As to the finding. Even before the act of 1865, c. 86, sect. 4 (13 Stat. 501, reproduced in sects. 649 and 700, Rev. Stat.), it was always held that a judgment on agreed facts spread at large on the record could be reviewed here on a writ of error. *United States* v. *Eliason,* 16 Pet., 291; *Simpson* v. *Baltimore & Susquehanna Railroad Co.,* 10 How., 329; *Graham* v. *Bayne,* 18 id., 60; *Suydam* v. *Williamson,* 20 id., 427; *Campbell* v. *Boyreau,* 21 id., 223; *Burr* v. *DesMoines Company,* 1 Wall., 99. Such a statement was considered to be equivalent to a special verdict and to present questions of law alone for the consideration of the court. It is manifest that the act of 1865 was not intended to interfere with this practice. The evident object of that leglislation was to give special findings the same effect for the purposes of a writ of error as a special verdict or an agreed case."

In *Lehnen* v. *Dickson,* 148 U. S., 71, this court said (p. 73):

> "It is true, if there be an agreed statement of facts submitted to the trial court and upon which its judgment is founded, such agreed statement will be taken as the equivalent of a special finding of facts. *Supervisors* v. *Kennicott,* 103 U. S., 554. Doubtless, also, cases may arise in which, without a formal special finding of facts, there is presented a ruling of the court, which is distinctly a ruling upon a matter of law, and in no manner a determination of facts, or of inferences from facts, in which this court ought to and will review the ruling. Thus, in *Insurance Company* v. *Tweed,* 7 Wall., 44, where on the argument in this court counsel agreed that certain recitals of fact made by the trial court in its opinion or 'reasons for judgment,' as it was called, were the facts in the case, and might be accepted as facts found by the court, it was held that, as they could have made such agreement in the court below, it would be accepted and acted upon here, and the facts thus assented to would be regarded as the facts found or agreed to upon which the judgment was based; and upon an examination it was further held that they did not support the judgment, and it was reversed."

In *Wilson* v. *Merchants Loan & Trust Co.,* 183 U. S., 121, the court said (p. 127):

> "In this case the finding is general, and, strictly construing the statute, the only questions which would be reviewable would be those questions which arose during the progress of the trial, and which were presented by bill of exceptions. It has, however, been held that where there was an agreed statement of facts submitted to the trial court and upon which its judgment was founded, such agreed statement would be taken as an equivalent of a special finding of facts. *Super-*

> *visors* v. *Kennicott*, 103 U. S., 554. But as such equivalent, there must of course be a finding or an agreement upon all ultimate facts and the statement must not merely present evidence from which such facts or any of them may be inferred."

In the very late case of *Guss et al.* v. *Nelson*, decided January 15, 1906, opinion by Mr. Justice Brewer, there was no special finding of facts made either by the District Court or the Supreme Court. In the early lines of his opinion Mr. Justice Brewer said:

> "Considering the writ of error, we remarked that no rulings were made in respect to the admission or rejection of testimony presenting anything worthy of consideration. No special findings of facts were made by either the District or Supreme Court, the former finding generally the issues in favor of the plaintiff, and rendering judgment upon such general finding, and the latter merely discussing the right of recovery upon the findings and such general finding."

The case involved the construction of a contract,—purely a question of law; no special finding of facts was necessary. This court made a statement of the case and delivered an opinion and judgment thereon. So in the case at bar. There is no issue of fact. The record presents pure questions of law.

Thus, we submit the case is properly here by writ of error, and the questions presented for review are preserved in the record in the manner prescribed by the statute under the decisions of this court.

II.

THE MERITS.

We shall now reply to defendant's argument on the merits of the case.

Counsel insist that the Chicago Bank cannot rely upon the claim that it was a *bona fide* purchaser for value without notice, because it did not make that claim or take that position in its pleadings.

The argument of counsel upon this point is a criticism of our course in pleading *facts* instead of *conclusions*. We sought in our pleadings to set up facts from which the court could conclude the legal rights of the parties. Our action in that behalf complies with the rules of pleading so well established that reference to them here is unnecessary.

The Chicago Bank avers in its amended petition (Rec., 20), that it relies upon its chattel mortgage bearing date April 17, 1901. The Geneseo Bank, in its answer, sets up that it relies upon its mortgage dated June 27, 1900. And the Chicago Bank, in its reply to said answer avers that the notes secured by the mortgage set up in defendant's answer were paid by the giving of a new note by the mortgagor to the original mortgagee. That immediately thereafter the mortgage of the Geneseo Bank was satisfied of record by the original mortgagee, and the release evidencing such satisfaction is set out as "Exhibit A" to the reply. (Rec., 32.)

There is no rule of code or common law pleading which requires the Chicago Bank to set forth in its

pleadings the evidence by which it proposed to support those pleadings. We submit the pleadings clearly put in issue the material question in this controversy. That is, whether the Chicago Bank, having made its loan relying upon the release of record of the mortgage securing the loan owned by the Geneseo Bank should not, as against the Geneseo Bank, be protected, and that the Geneseo Bank, by failing to take and record an assignment of its mortgage, left it within the power of the mortgagee as against the right of the Chicago Bank, the *bona* fide purchaser of notes secured by a subsequent mortgage, to fraudulently release the the mortgage upon which it, the Geneseo Bank, relied.

Thus, we say, the Chicago Bank has pleaded the *fact* rather than the *conclusion*, that it was a *bona fide* purchaser for value without notice.

It is also claimed the Chicago Bank did not advance its money after the release was filed for record, relying upon the faith thereof. Neither on the trial of this case in the *nisi prius* court, nor in the Supreme Court of Oklahoma, did counsel attempt to make this point, and we submit they cannot now raise it for the first time.

The release in question shows it was filed for record on the 27th day of November, 1900, and the chattel mortgage relied on by the Chicago Bank bears date April 17, 1901. Meanwhile, in February, 1901, the Chicago Cattle Loan Company, whose president was also the president of the Chicago Bank, caused the records to be inspected, and that inspection disclosed the fact of the release on November 27, 1900, of the

Geneseo Bank's mortgage. The fact the Chicago Cattle Loan Mortgage was taken prior to the filing of this release, and the Chicago Bank's mortgage was but a renewal or extension of the same loan, is no argument against the position of the Chicago Bank, and does not support counsel's contention against the undisputed fact supported by the testimony of the witnesses Doud and True, to which counsel refer, that the Chicago Bank did rely upon the release.

But for the sake of the argument, let us assume, as against the stipulated facts, that the Cattle Loan Company held a second mortgage upon the cattle, and that the Geneseo Bank held a first mortgage. That is no argument or reason why the Chicago Bank should continue in the same position as the Cattle Loan Company. At the time of the maturity of the Cattle Loan mortgage, assuming as aforesaid for the purpose of the argument that it was a second mortgage, it might have been able to have collected its debt from the maker of the notes, without relying upon the mortgage, or it might have had other means of enforcing the collection. We submit the presumption is, and this presumption is supported by the undisputed facts, that neither it nor the Chicago Bank was willing to extend that loan without the security of the mortgage, and to that end it caused the records to be carefully examined.

Counsel argue throughout their brief that the Chicago Bank is not a *bona fide* purchaser for value without notice, because it took its notes as a renewal of notes and mortgage to the Chicago Cattle Loan Company; that the original notes and mortgage

held by the Cattle Loan Company were executed October 17, 1900, and were held by that company before the release was filed. This argument is contrary to the express stipulation of the parties, as set forth in counsel's own brief, thus (Br., 20):

> "That the mortgage held by the plaintiff, Chicago Bank, was executed by W. B. Grimes, Jr., in Clark County, Kansas, dated April 17, 1901, and securing two promissory notes, each for the sum of $7,694.77 of even date with said mortgage, and payable October 27, 1901, to the Siegel-Sanders Live Stock Company, executed by W. H. Grimes, Jr., as mortgagor, to the Siegel-Sanders Live Stock Commission Company as mortgagee; that said last mortgage was filed for record in the office of the register of deeds of Clark County, on April 25, 1901, and duly recorded in book 6, at page 132; that said last mortgage was duly acknowledged by said W. B. Grimes, Jr., before M. G. Stevenson, a notary public of Clark County, Kansas, on April 19, 1901."

It was further stipulated (Br., 20) that the notes held by the Chicago Bank were, at the date of the commencement of this suit, and still are, due and unpaid. It was also stipulated (Br., 22) that the notes held by the Chicago Bank were and have been, since the date of April 17, 1901, held and owned by the Chicago Bank, that the chattel mortgage securing the notes has, since the 27th day of April, 1901, been continuously held and owned by said Chicago Bank, and that nothing has ever been paid on said notes, or either of them.

Concerning this mortgage, the Supreme Court of the territory, basing its decision upon the testimony of the witness True and the witness Doud, found:

> "And it (Chicago Bank) believed at the time it bought these notes (the notes secured by the

mortgage dated April 17, 1901), that the mortgage securing them was a first lien on the cattle, and it secured this information from Mr. True who personally examined the record."

This position of the Chicago Bank is supported by the stipulations. By written stipulation it was agreed between the parties (Rec., 34) that the 526 head of cattle should be valued at $24 per head. This would make their agreed value $12,624. If the Chicago Bank had knowledge, when it purchased its notes on April 17, 1901 that the Geneseo Bank already had a live mortgage on the cattle for $11,111.33, which was almost their actual value, it follows that the officers of the Chicago Bank were so insane as to invest $15,389.54 more in the cattle. This fact alone is enough to explode the theory of counsel for the Geneseo Bank that the Chicago Bank invested $15,389.54 in notes secured by chattel mortgage on the cattle, upon which it then knew the Geneseo Bank had a prior lien amounting to $11,111.23.

It is also insisted the Chicago Bank is not a *bona fide* purchaser, because it failed to make inquiry when it purchased its notes as to the whereabouts of the notes held by the Geneseo Bank secured by first mortgage, and for failure to make such inquiry counsel argue the Chicago Bank was negligent, and cannot rely solely upon the release. The argument is that the Chicago Bank should have compelled production of the notes by the Commission Company, and should have obliged the latter to prove that the release executed by the Commission Company, and filed for record, was not a falsehood; and it is persistently stated that it was the duty of the Chicago Bank to go about making in-

quiry as to the truthfulness of the transaction evidenced by the release of the Commission Company duly filed for record.

Preliminary to a discussion of the legal obligation of the Chicago Bank in that behalf, we ask counsel whether it would not have been absurd for the Chicago Bank to have assumed that had it made such inquiry of the Commission Company it would have received any other or different information than that shown by the solemn release of the Commission Company duly executed and filed for record? Would it be possible for the Commission Company to have consistently filed for record a release reciting the payment of the notes held by the Geneseo Bank, and yet have answered any inquiry contradictory of its act in that behalf? No claim is made that the Chicago Bank knew, or had any means of knowing that the Commission Company had negotiated the notes; on the contrary, the Chicago Bank assumed, as it had a right to assume, that the Commission Company, being the original mortgagee, no assignment to any other appearing of record, not only had the right and was the only party having the power to execute the release, or to acknowledge payment of the notes secured by the mortgage, and that it had surrendered the past due notes, cancelled, to the mortgagor.

As a matter of law, this argument of counsel is conclusively met by:

Williams v. *Jackson*, 107 U. S., 478;
Lennertz v. *Ouilty*, 191 Ill., 174, and
Thomas v. *Reynolds*, 29 Kans., 216.

In the last case, as the court will remember, Mr.

Justice Brewer said that a release by any other than the person having the title of record would have been "an impertinent interference."

An attempt is made to excuse the negligence of the Geneseo Bank in failing to take and file an assignment of its mortgage, by the assertion that there was no law of the State of Kansas which permitted the defendant, the Geneseo Bank, to obtain and file such assignment.

Our contention is and always has been, that there was no law of the State of Kansas which *prohibited* the Geneseo Bank from failing to protect itself in this behalf. And that common prudence demanded it should, by taking and filing such assignment, insure to itself the security afforded by the mortgage, and thereby prevent a subsequent fraudulent release by the original mortgagee.

There is no law in Illinois requiring, or even specifically authorizing the holder of notes secured by a mortgage, to take and file an assignment of record, but as we have seen from the cases cited in our original brief, the Supreme Court of the State of Illinois has repeatedly held that failing so to do, the rights of the assignee of such mortgage are postponed to those of a subsequent *bona fide* purchaser who has acquired an interest in the property relying upon a fraudulent release by him in whom the record showed sole power to execute such release, and that it was not only the right, but the *duty*, of the assignee of a mortgage to take and file an assignment.

Counsel have found no case holding to the contrary, and we submit the authorities cited by us under point I of our original brief are conclusive.

The cases cited by counsel from the Supreme Court of Kansas, and particularly *Burhans* v. *Hutcheson*, and *Insurance Co.* v. *Huntington*, have no application to the case at bar, because in none of the Kansas cases were the rights of a *bona fide* innocent purchaser involved.

In the consideration of this case it must be continuously kept in mind that the Chicago Bank is a subsequent purchaser in good faith without notice, and that not only was it without notice of any claim or lien of the Geneseo Bank, but it did all the law required of it, *i. e.*, examined the records and found the title to the property clear.

Counsels' difficulty in this case is because of their failure to discriminate between the rights of an innocent purchaser without notice, and of one with full notice. The cases cited by them clearly indicate their misapprehension, and are therefore not in point.

We do not contend, and never have contended, that the wrongful release as between the Commission Company and the Geneseo Bank in any way impaired the lien of the mortgage securing the notes held by the Geneseo Bank as between the Commission Company and that bank, in the absence of a *bona fide* purchaser for value without notice. But that is not this case. It is immaterial to the Chicago Bank, and to this controversy, whether the release by the Commission Company was fraudulent as between that company and the Geneseo Bank. The question presented here is the respective rights of the two banks.

In *Windle* v. *Bonebrake et al.*, 23 Fed. Rep., 165, an

opinion was rendered by the Circuit Court of the United States for the District of Kansas by Judge Foster, Judge Brewer concurring. In that case Bonebrake and wife executed in Kansas a negotiable bond and mortgage to Stover for $500, payable five years after date, at a bank in Pennsylvania. Stover placed the mortgage on record and then sold and transferred the note and mortgage to Hurd, who sold and transferred them to Windle, who became the *bona fide* holder. After Bonebrake and wife had executed and delivered the mortgage they sold and conveyed the real estate to Boydston subject to the mortgage, who sold it to Likes, who sold and conveyed it to Sheer. When Sheer purchased the property there was no assignment of the mortgage on record and he had no knowledge of the assignment of the mortgage, although the record showed it was in existence and uncancelled. Stover falsely represented to Sheer that he (Stover) still owned the mortgage and held it in his possession and would cancel it if Sheer paid him the money. Sheer paid Stover the money and Stover, without authority, cancelled the mortgage on the record. The question then arose whether Sheer or the plaintiff had the first lien. The court recognized the rule laid down in *Carpenter* v. *Longan*, 16 Wallace, 271, that the bond and mortgage were inseparable when the purchaser of the property took it knowing that the mortgage was unpaid. In the case at bar the Chicago Bank did not know that the mortgage had not been paid. On the contrary, its payment was acknowledged by the mortgagee who presumably was the only person who had the power to acknowledge payment of it. In deliver-

ing its opinion and judgment the court said (page 167):

> "Had Sheer found the record of the mortgage released and satisfied by the mortgagee, and he had no actual notice of the assignment, or that the debt was unpaid, he might well have relied on the record; and in such a case he would take the land free of incumbrance, although the record may have been released by fraud, accident, or mistake, or merger of titles. Jones Mortg., Sec. 472; *Purdy* v. *Huntington*, 42 N. Y., 334; *Gillig* v. *Maas*, 28 N. Y., 191; *Brown* v. *Blydenburg*, 7 N. Y., 141; *Kellogg* v. *Smith*, 26 N. Y., 18; *Van Keuren* v. *Corkins*, 66 N. Y., 77; *Bank* v. *Anderson*, 14 Iowa, 544; *Vannice* v. *Bergen*, 16 Iowa, 555; *McClure* v. *Burris*, id., 591; *Cornog* v. *Fuller*, 30 Iowa, 212; *Bowling* v. *Cook*, 39 Iowa, 200; *Baldwin* v. *Sager*, 70 Ill., 505; *Ogle* v. *Turpin*, 102 Ill., 148; *Ayers* v. *Hays*, 60 Ind., 452; *Etzler* v. *Evans*, 61 Ind., 56."

The principle here laid down, fortified by the authorities, many of which are cited in our original brief, is the exact principle for which we are contending and under which we claim the Chicago Bank is a *bona fide* purchaser for value without notice and had the right to rely upon the record, in all respects regular.

Conclusion.

We submit this court has jurisdiction on the writ of error; that the full statement and finding of facts of the Supreme Court of the Territory of Oklahoma is a compliance with the statute; that this Court will hear and determine the case on the bill of exceptions; that the stipulations of the parties, spread upon the record, are equivalent to a special finding of facts;

that the Chicago Bank properly pleaded the facts which entitled it to claim and prove that it was a *bona fide* purchaser for value without notice; that the Chicago Bank was not bound to make inquiry of the Commission Company as to the truth or falsity of the record; that the Chicago Bank *is* a *bona fide* purchaser for value without notice; that it was the duty of the Geneseo Bank to take and record an assignment of the chattel mortgage securing the note, in order to protect itself against the fraud of the Commission Company; that the Geneseo Bank left it within the power of the Commission Company to execute and record the release upon which the Chicago Bank in good faith acted, and that the Geneseo Bank now should abide by the consequences of its negligence.

It is respectfully submitted the Chicago Bank is entitled to the judgment of the court reversing the judgment of the Supreme Court of the Territory of Oklahoma.

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33

Error to the Supreme Court of the Territory of Oklahoma.

Statement of the Case, Brief and Argument

for the Defendant in Error.

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Statement of the Case, Brief and Argument

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STATEMENT OF THE CASE.

Two questions arise in this case: 1. Does this court have jurisdiction of this case? 2. If this court does have jurisdiction of the case, should the judgment brought up for review be affirmed? If this court does not have jurisdiction, of course, that is the end of the case.

On two grounds we think this court is without jurisdiction.

This is a law action in replevin which was tried twice in the trial court in Oklahoma, without a jury each time, and the case is brought to this court by a writ of error from the Supreme Court of Oklahoma, and not by an appeal. Again, there was no finding of facts in the nature of a special verdict, either in the District Court of Woodward County, Oklahoma, where the case was tried, or in the Supreme Court of Oklahoma, from which court it comes to this court by writ of error.

It is submitted, first, that this case is wrongly brought to this court by writ of error and that it should have been brought here by appeal.

It is submitted, in the second place, that, even if the case were here by appeal, it is not cognizable here, because there is no special finding of facts by any of the courts in Oklahoma.

The action was brought (p. 5, printed Record) in the District Court of Woodward County, Oklahoma, by the plaintiff in error as plaintiff against the defendant in error, as defendant.

As already stated, the action was in replevin to recover a bunch of cattle. The pleadings of the parties may be found from p. 6 to p. 32 of the printed Record. Those pleadings consist of an amended petition of the plaintiff, answer of the defendant and reply thereto of the plaintiff. The cause was tried in the District Court of Woodward County, Oklahoma, April 24, 1902, before the court without the intervention of a jury (p. 37, printed Record).

The stipulation under which said cause was tried by the court without a jury may be found at p. 34, printed Record.

The judgment of the Woodward County District Court at that trial was in favor of the plaintiff, the Chicago bank, and against the defendant, the Geneseo bank.

Thereafter the defendant, the Geneseo bank, removed the case to the Supreme Court of Oklahoma, where it was heard, and on March 4, 1904, was decided by the Oklahoma Supreme Court, by the reversal of the judgment of said District Court and the remanding of the cause for further trial. The opinion of said Supreme Court delivered on March 4, 1904, reversing said judgment and remanding the cause for re-trial, may be found from p. 140 to p. 150 of the printed Record.

Afterwards, on April 18, 1904, said cause was again tried by the District Court of Woodward County, Oklahoma, by the court without a jury, which was again waived by the parties (p. 36, printed Record), and final judgment in said cause given for the defendant, Geneseo bank, against the plaintiff, Chicago bank.

The journal entry of that finding and judgment may be found from p. 132-134 of the printed Record.

The case again went to the Supreme Court of Oklahoma, this time being removed by the Chicago bank, and, on February 11, 1905, the Oklahoma Supreme Court affirmed the second judgment given in the cause by the Woodward County District Court.

The opinion of the Oklahoma Supreme Court on the second hearing of the cause may be found at p. 139 of the Record.

Thereafter, and in May, 1905, the plaintiff, Chicago bank, removed the cause to this court by writ of error.

No special finding of facts was made by the District Court of Woodward County, Oklahoma, at either trial, although both trials in that court were by the court without a jury. No special finding of facts in the case was made on either hearing by the Oklahoma Supreme Court. An opinion was given by the court, the first opinion ending with the reversal and remanding of the cause, and

the second opinion with an affirmance of the judgment of the trial court.

The so-called finding of facts which appears at pp. 2-3 of the Brief and Argument for plaintiff in error, was never made as a finding of facts, either by the Oklahoma Supreme Court or the District Court of Woodward County, Oklahoma.

The Statutes of the United States and the decisions of the courts bearing upon the question of jurisdiction in this case, may be found collected at pp. 459-460-461 of Vol. 4 of the Federal Statutes Annotated. The statute reads as follows:

> "That the appellate jurisdiction of the Supreme "Court of the United States over the judgments and "decrees of said Territorial courts in cases of trials "by jury shall be exercised by writ of error, and in "all other cases by appeal according to such rules "and regulations as to form and modes of proceeding "as the said Supreme Court have prescribed or may "hereafter prescribe:
>
> "Provided, that on appeal, instead of the evi- "dence at large, a statement of the facts of the case "in the nature of a special verdict, and also the rul- "ings of the court on the admission or rejection of "evidence when excepted to, shall be made and certi- "fied by the court below, and transmitted to the Su- "preme Court, together with the transcript of the "proceedings and judgment or decree; but no appel- "late proceedings in said Supreme Court, heretofore "taken upon any such judgment or decree, shall be "invalidated by reason of being instituted by writ "of error or by appeal."

This case having been tried by the court without a jury should have been brought here by appeal, and not by writ of error. The following decisions of this court are in point in support of this proposition:

> *Stringfellow* v. *Cain*, 99 U. S., 610; l. c., 612-613-614;

Davis v. *Fredericks*, 104 U. S., 618-619;
Neslin v. *Wells*, 104 U. S., 428;
Hecht v. *Boughton*, 105 U. S., 235;
United States v. *Railroad Co.*, 105 U. S., 263;
Gray v. *Howe*, 108 U. S., 12;
Story v. *Black*, 119 U. S., 235;
Idaho Land Co. v. *Bradbury*, 132 U. S., 509; l. c., 513;
Gregory Mining Co. v. *Starr*, 141 U. S., 222;
San Pedro Co. v. *United States*, 146 U. S., 130;
Mining Co. v. *Machine Co.*, 151 U. S., 447;
Bonnifield v. *Price*, 154 U. S., 672;
Hawes v. *Mining Co.*, 160 U. S., 303;
Grayson v. *Lynch*, 163 U. S., 468;
Young v. *Amy*, 171 U. S., 179;
Marshall v. *Burtis*, 172 U. S., 630;
Cohn v. *Daly*, 174 U. S., 539.

Upon the second point as to the jurisdiction of this court that this court cannot consider the case because there is no finding of facts in the nature of a special verdict in the case, either by the Supreme Court of Oklahoma or the District Court of Woodward County, Oklahoma, we call attention to the pointed language in the opinion of this court, delivered by Chief Justice Waite, in the case of *Bonnifield* v. *Price*, 154 U. S., 672.

In that case Chief Justice Waite said:

"This is a writ of error to bring here for review "a judgment of the Supreme Court of the Territory "of Wyoming in a case where the trial was not by "jury. It is therefore dismissed on the authority "of *Hecht* v. *Boughton*, 105 U. S., 235, decided at "the present term. The appropriate remedy in this "case, under the act of April 7, 1874, ch. 80, Sup. "Rev. Stat., 12, was by appeal.

"But if we could treat this writ of error as an "appeal, the case is in no condition for an examina- "tion here, because there is no such statement of

"facts in the record as the law requires. The bill "of exceptions taken in the District Court contains "all the evidence, and as the Supreme Court directed "a judgment in favor of the defendant, it is clear "that court passed on other questions than such as "were presented on the rulings in the admission of "evidence. Under these circumstances a statement "of facts such as the statute requires is necessary "to enable us to re-examine the case."

As we have seen, in the case at bar, no special finding of facts was made at either trial by the District Court of Woodward County, Oklahoma, or by the Supreme Court of Oklahoma, at either hearing. The alleged finding of facts set out at pp. 2-3 of the brief and argument for plaintiff in error in this court is a mere culling together of some of the facts contained in the opinion of the Oklahoma Supreme Court on the first hearing of the cause (p. 141, printed Record).

It is the well settled law of the Federal appellate tribunals, both supreme and circuit courts of appeal, that any statement of facts in an opinion by the court cannot be taken or considered as a finding of facts in the nature of a special verdict.

Dickinson v. *Bank,* 16 Wall, 250; l. c., 252-256;
Lahner v. *Dickson,* 148 U. S., 71; l. c., 74;
Saltonstall v. *Birtwell,* 150 U. S., 417;
Stone v. *United States,* 164 U. S., 380;
Kentucky Life Insurance Co. v. *Hamilton,* 63 Fed. Rep., 93; 11 C. C. A., 42;
Minchen v. *Hart,* 72 Fed. Rep., 294; 18 C. C. A., 570;
National Masonic Ass'n v. *Sparks,* 83 Fed. Rep., 225; 28 C. C. A., 399; l. c., 403;
Mutual Reserve Ass'n v. *Du Bois,* 85 Fed. Rep., 586; 29 C. C. A., 354.

The alleged finding of facts set out at pp. 2-3 of the brief and argument for the plaintiff in error does not contain all of the facts referred to by the court in its opinion. Thus, at p. 142 of the printed Record, it appears that the Oklahoma Supreme Court in its opinion says:

> "It is insisted that these notes were given as renewal of the second set of notes taken by the Siegel-Sanders Commission Company, but perhaps that is not material under our view of the law."

And the facts in regard to the renewal of the notes are not stated in the opinion. The Oklahoma Supreme Court decided the law of the case to be with the Geneseo bank, irrespective of the question whether the Chicago bank in its purchase of the notes and mortgage relied upon by it was an innocent subsequent *bona fide* purchaser for value without notice, and the facts relied upon in that part of this statement of facts which relates to the merits and which pertains to the issue submitted in all of the lower courts, whether the Chicago bank is a subsequent *bona fide* purchaser for value, are not set out in the opinion or referred to in any other way except by the above quoted remark.

As already stated, the Supreme Court of Oklahoma decided the law to be with the Geneseo bank, irrespective of the facts of this case showing that the Chicago bank was not an innocent subsequent purchaser for value without notice. It will be seen from that part of this statement which relates to the merits, that the question whether the Chicago bank was in fact, upon the conceded facts of this case, a subsequent *bona fide* purchaser for value without notice, was not responded to by the Supreme Court of Oklahoma in any way, either by a reference to the facts or by the question of law considered in its opinion. Of course, it goes without saying that the Okla-

homa Supreme Court in delivering its opinion never supposed that it was making a finding of facts in the nature of a special verdict in the case. The opinions of the Supreme Court of Oklahoma, in cases decided by it, are written and filed under Sections 4456-4457, p. 859 of the Statutes of Oklahoma for 1893. Those two sections read as follows:

> 4456. It shall be the duty of the judges of the Supreme Court to prepare, and file with the papers in each case, full notes of the opinion of the court upon the questions of law arising in the case, within sixty days after the decision of the same; and the opinion so filed shall be treated as a part of the record in the case, but no costs shall be charged therefor, except for copies thereof ordered by a party; and no mandate shall be sent to the court below, until the opinion provided for by this section has been filed.
>
> 4457. A syllabus of the points of law decided in any case in the Supreme Court shall be stated, in writing, by the judge delivering the opinion of the court, and filed with the papers of the case, which shall be the points of law arising from the facts in the case that have been determined by the court; and the syllabus shall be submitted to the judges concurring therein, for revisal before filing thereof, and it shall be filed with the papers, without alteration, unless by consent of the judges concurring therein; and a copy of such syllabus shall, in all cases, be sent to the court below, by the clerk of the Supreme Court, with the mandate provided for by Section five hundred and seventy-seven of this act.

These sections do not require the opinion to contain any facts or finding of facts, or even a statement of the facts of the case to be embodied in the opinion of the court. Again, the alleged finding of facts at pp. 2-3 of the brief or plaintiff in error does not refer to all of the facts which are mentioned in the opinion of the court. There are different facts mentioned at different points

in the opinion of the Oklahoma Supreme Court, in a sort of desultory and fragmentary, but entirely proper manner, which are not contained in the alleged finding of facts at pp. 2-3 of the argument and brief of plaintiff in error. Thus, at the top of p. 143 of the printed Record appears the following in said opinion:

> "The Bank never appointed the Siegel-Sanders "Commission Company its agent to collect this "money, nor did that Company have any express "or implied authority to do so or to release the "chattel mortgage which secured the same."

This statement of fact is not embodied in the alleged finding of facts in the brief of counsel for the Chicago Bank. Again, one of the points decided by the Oklahoma Supreme Court was, that the release relied upon by the Chicago Bank, not being acknowledged, was not properly recorded and was not valid or binding as against the Geneseo Bank. However, neither that release nor the fact that it was not acknowledged appears in the alleged finding of facts at pp. 2-3 of the brief and argument of the plaintiff in error. That release and the fact that it was not acknowledged, however, appears in another part of the opinion of the Oklahoma Supreme Court to be found at p. 148 of the printed Record.

Again at p. 142 of the printed Record appears the following in the opinion of the Oklahoma Supreme Court:

> "A number of questions are argued in the "briefs, and while we will not discuss, we have con- "sidered them all and will discuss those which we "think are controlling."

It thus appears that the opinion of the Supreme Court does not respond to all of the issues in the case, either of law or fact, and, of course, the court at different points in its opinion simply referred to those facts which had relation to the law questions discussed by it; but the

facts which at different points in the opinion are referred to, are nowhere stated by the court with any intention that they should be considered as a special finding of facts by the court in the nature of a special verdict.

It was the duty, we submit, of counsel for the plaintiff in error in this case to have had the District Court on the trial of the case, especially at the second trial, make a finding of facts in the nature of a special verdict. This could have been done under Section 4180 of the Code of Civil Procedure, p. 812, of the Territory of Oklahoma for 1893, which section reads as follows:

> "Upon the trial of questions of fact by the "court, it shall not be necessary for the court to "state its findings, except generally, for the plaintiff "or defendant, unless one of the parties request it, "with the view of excepting to the decision of the "court upon the questions of law involved in the "trial; in which case the court shall state, in writing, "the conclusions of fact found, separately from the "conclusions of law."

This is the practice which is to be found in all, or nearly all, of the code states and fully enabled the plaintiff in error to obtain the finding of facts necessary to give this court jurisdiction on an appeal. This court has more than once held that where a finding of facts such as the above statute contemplates is made by the Territorial trial court and that finding of facts is passed upon by the Territorial Supreme Court, such finding of facts by the trial court becomes the finding of facts by the Supreme Court for the purpose of jurisdiction by the Supreme Court of the United States on an appeal.

We submit, that it was the duty of the plaintiff in error in this case to have had a finding of facts made by the trial court under this statute, especially so, when it is considered that after the first hearing in the Oklahoma Supreme Court, the re-trial in the District Court at the

second trial and the re-hearing on the second hearing in the Oklahoma Supreme Court were all had *pro forma*, preparatory to and to perfect an appeal to this court. Therefore, we submit, that it was the duty of counsel for plaintiffs in error in this case to have had prepared and made by either the District Court of Woodward County, Oklahoma, on the second trial, or by the Supreme Court of Oklahoma on the second hearing, a finding of facts, since that was absolutely essential to give this court jurisdiction on an appeal.

The opinion of the Supreme Court of Oklahoma, from which the plaintiff in error culls the facts alleged to constitute the findings of fact, was delivered by the court on the first hearing. But the writ of error in this case does not bring before this Court the judgment or opinion of the Oklahoma Supreme Court delivered on the first hearing. The judgment and opinion of the Oklahoma Supreme Court on the first hearing reversed and remanded the cause, opened up the case for a re-trial, and counsel for the plaintiff in error, conceding that that was not a final judgment which could be brought before this court by writ of error or appeal, had the case sent back to the state court so that it could be finally disposed of for the purpose of an appeal to this court. The appeal to this court is not made from the first decision and opinion of the Oklahoma Supreme Court, but from its last judgment and opinion.

Passing now from these jurisdictional points, we proceed to state the facts from the evidence in the record in the case, for the consideration of this court, if this court shall be of the opinion that these points as to the jurisdiction of the court are not well taken.

The action was brought in the trial court by the said National Live Stock Bank of Chicago, as plaintiff, against said First National Bank of Geneseo, Illinois, as defendant.

For convenience we will speak of these parties as they were characterized in the trial court. We will describe the plaintiff in error here, and speak of it in this record as the plaintiff Chicago Bank, and this may be understood as referring in each instance to the National Live Stock Bank of Chicago; and we will describe the First National Bank of Geneseo, Illinois, which is the defendant in error here and the defendant below, as the defendant Geneseo Bank.

The action was in replevin for five hundred head of cattle, valued at the sum of twenty-four dollars each.

The claim of the plaintiff, Chicago Bank, is under and by virtue of two promissory notes, given and dated on April 17th, 1901, and each for the sum of seventy-six hundred ninety-four and 77-100 ($7,694.77) dollars, payable October 27th, 1901, both executed by W. B. Grimes, Jr., and payable to the order of Siegel-Sanders Live Stock Commission Company, and a chattel mortgage which was given by the mortgagor, W. B. Grimes, Jr., to said Siegel-Sanders Live Stock Commission Company, on said 500 head of cattle, to secure the payment of said notes, and which notes and mortgage were afterwards assigned to said plaintiff, Chicago Bank. The petition may be found from page 5 to page 8 of the printed Record. Copies of said notes, as exhibits to said petition, may be found at pages 8 and 9 of the printed Record. A copy of said chattel mortgage given by Grimes to said commission company as security for said notes, which was filed as an exhibit to said petition, may be found from page 9 to page 13 of the printed Record. With said petition, plaintiff, Chicago Bank, filed a replevin bond and affidavit in replevin (pp. 15 to 17 of the printed Record).

The suit was commenced on May 28th, 1901, and on the same day the clerk issued an order of delivery (p.

17, Record). This order of delivery was served by taking the cattle from the possession of the defendant, Geneseo Bank, and delivering the same to the plaintiff, Chicago Bank (p. 18, Record).

Afterwards, pursuant to a stipulation of the parties, the plaintiff, Chicago Bank, filed an amended petition (pp. 20 to 23, Record). The amended petition set out the same notes and mortgage hereinbefore referred to, that were stated in the original petition. Both the original and amended petition averred that the cattle conveyed by said mortgage were in Clark County, Kansas; that the mortgagor, W. B. Grimes, was a resident and citizen of Clark County, Kansas, and that said chattel mortgage was recorded with the register of deeds of said Clark County, Kansas, under the laws of said State of Kansas, which are set out and pleaded in said amended petition. The amended petition, the same as the original petition, concluded with a prayer for judgment for possession of the personal property sued for.

The answer of the defendant, Geneseo Bank, extends from page 23 to page 26 of the printed Record. The answer denied all the averments of the amended petition, except that the plaintiff and defendant Banks were national banking corporations, duly organized under the laws of the United States, which was admitted. The answer of the defendant, Geneseo Bank, then proceeded to aver the execution and delivery by said W. B. Grimes, Jr., of a promissory note to said Siegel-Sanders Live Stock Commission Company, and payable to its order, for the sum of eleven thousand one hundred eleven and 23-100 ($11,111.23) dollars, dated June 27th, 1900, and payable November 1st, 1900, with interest at eight per cent per annum, and that said Grimes for the purpose of securing the payment of said note, executed and delivered to said Siegel-Sanders Live Stock Commission

Company, his certain chattel mortgage dated June 27, 1900, whereby he conveyed unto said Siegel-Sanders Live Stock Commission Company five hundred and twenty-six (526) head of cattle, which were located in Clark County, Kansas, and that said Grimes was a resident of said county, and that on July 12th, 1900, said mortgage was duly recorded in the office of the register of deeds of said Clark County, Kansas. Certain statutes of the State of Kansas, were also copied and pleaded in said answer.

It was further averred in said answer that said last note and mortgage, before the maturity of said last note, were duly sold, endorsed by endorsement on the back of said note, and delivered to said defendant Geneseo Bank for a valuable consideration paid by said defendant, Geneseo Bank, to said Siegel-Sanders Live Stock Commission Company, and that ever since said endorsement, sale and delivery of said note and mortgage, said defendant, Geneseo Bank, had been and still was the owner and holder of said last note and mortgage.

Said answer pleaded the terms and conditions of said mortgage and averred that it was provided in said chattel mortgage so held by defendant, Geneseo Bank, that if default should be made in the payment of said note when the same became due and payable, or that in case of a sale or disposal or attempt to sell or dispose of said cattle, conveyed by said mortgage, or in case of a removal or attempt to remove the same from the place where the same was located, or if from any other cause the security should become inadequate, or said party holding said mortgage should deem itself insecure at any time before the indebtedness evidenced by said note should be fully paid, then it should be lawful for the said "Party of the second part in said mortgage described, to-wit., the Siegel-Sanders Live Stock Commission Com-

pany, its successors or assigns," to enter upon the premises and to take possession of the cattle, and proceed to sell the same.

It was further averred in said answer that the conditions of said mortgage were broken, and that default had been made in payment of said last note and that said cattle had been removed from the premises in Clark County, Kansas, where they were situated when the mortgage was made, and that the defendant, Geneseo Bank, deemed itself insecure, and was therefore entitled to the possession of said cattle under said mortgage. Said answer concluded with a prayer for the possession of said property.

The said last note given for the sum of $11,111.23, being payable to order, is negotiable and together with the endorsement thereon, by which title thereto was transferred to said defendant, Geneseo Bank, may be found at page 27 of the printed Record.

A copy of the mortgage pleaded in defendant's answer may be found from page 27 to page 30 of the Record.

To the new matter pleaded in defendant's answer the plaintiff, Chicago Bank, filed a reply (pp. 31 and 32, printed Record). By said reply said plaintiff, Chicago Bank, denied each and every allegation in said answer not inconsistent with plaintiff's amended petition, and not hereinafter expressly admitted.

Said reply further alleged that the note mentioned in defendant's answer was paid and fully discharged, said note being then the property of the said Siegel-Sanders Live Stock Commission Company and due by payment on November 24, 1900, of said note, to said Siegel-Sanders Live Stock Commission Company, by said W. B. Grimes, the maker thereof, by the execution and delivery of another note for about the sum of fourteen

thousand dollars, and that on said November 24, 1900, said Siegel-Sanders Live Stock Commission Company, by its president, executed and delivered its certain release, whereby the said mortgage so held by said defendant, Geneseo Bank, was discharged and payment thereof acknowledged, and that thereafter, on November 27th, 1900, said release so executed by said Siegel-Sanders Live Stock Commission Company was filed in the office of the register of deeds of said Clark County, Kansas, and that said register of deeds thereupon entered said release and satisfied said chattel mortgage so held by said defendant, Geneseo Bank, upon the chattel mortgage records of said county, and thereby released, cancelled and finally discharged said chattel mortgage of record, and a copy of said release is filed with said reply.

On these pleadings the case came on for trial in the District Court of Woodward County, Oklahoma, without the intervention of a jury. The evidence in the case continues from page 33 to page 131 of the Record.

A stipulation signed by the counsel of the parties (p. 35, Record), was read to the court, which provides as follows:

> "That in order to avoid the expense of taking evidence to prove the law of the State of Kansas relative to this case, each party may have the right to use the Statutes and Session Laws of Kansas and the Supreme Court Reports and the appeal Reports of said state, whether the same have been set up in the pleadings or not, without objection as to the point whether or not the law has been pleaded by either plaintiffs or defendants."

Another stipulation was read to the court (p. 34, Record), by which said last stipulation it was agreed and stipulated that there were in existence, at the time of the order of delivery in this suit, to-wit., on May 28th, 1901, covered by the chattel mortgage claimed to be owned by

said defendant, Geneseo Bank, and bearing date June 27th, 1900, as well as by the chattel mortgage claimed to be owned by the plaintiff, Chicago Bank, bearing date April 17th, 1901, both of which mortgages were executed by W. B. Grimes, Jr., as mortgagor, to Siegel-Sanders Live Stock Commission Company, five hundred head of steers; that for the purposes of this trial, the value of said five hundred head of steers should be taken at twenty-four dollars ($24.00) per head; that while of said five hundred head of steers, only three hundred and seventy-four (374) head were taken on the order of delivery herein, the title to the remaining one hundred twenty-six (126) head should abide by and be controlled by the final determination of this suit, and that any judgment entered in this case should include said one hundred twenty-six head of cattle, as well as said three hundred seventy-four head so taken on said order of delivery, and a trial by a jury was waived by said last stipulation. The aggregate value of said five hundred head of cattle thus included in this suit, at the rate of twenty-four ($24.00) dollars per head, which was the value per head fixed by said stipulation, is twelve thousand ($12,000.00) dollars.

Counsel of the plaintiff and defendant Banks made statements of their cases, which statements are contained in the printed Record (pp. 37 to 52).

On behalf of plaintiff Chicago Bank, its counsel stated that on June 27th, 1900, said Grimes, who resided at Ashland, Clark County, Kansas, made a certain promissory note for eleven thousand one hundred and eleven dollars and some cents, payable six months after date, secured by a chattel mortgage on 526 head of steers, being in Clark County, Kansas, and said mortgage being executed and filed for record in Clark County, Kansas, on July 12th, 1900, and that said mortgage was made to

Siegel-Sanders Live Stock Commission Company, of Kansas City; that afterwards, on November 24th, 1900, Siegel-Sanders Live Stock Commission Company executed a release of that mortgage and forwarded it to the register of deeds at Ashland, Clark County, Kansas, for record; that on October 24th, 1900, said Grimes executed another mortgage on the same cattle and some more in addition thereto, making in all six hundred thirty-three (633) head of cattle; that said release was filed for record in the office of the register of deeds of Clark County, Kansas, on November 27th, 1900; that said last mortgage was filed for record in the office of the register of deeds of Clark County, Kansas, on October 27th, 1900; that said last mortgage secured two (2) promissory notes, due six months after date, or on April 17th, 1901, one of those notes being for seven thousand ($7,000) dollars and the other being for seven thousand thirty-three ($7,033) dollars and some cents, and that afterwards, on April 17th, 1901, Grimes executed a third chattel mortgage to secure two (2) notes six months after date, or on October 17th, 1901, which last two notes aggregated a little over fifteen thousand ($15,000) dollars; that on May 21st, 1901, learning that the defendant, Geneseo Bank, had taken possession of the cattle covered by said mortgage, made in June, 1900, demand was made for the surrender and possession of said cattle, which defendant, Geneseo Bank, refused to obey, and that the cattle had been removed from Ashland, Kansas, to Oklahoma Territory and to said Woodward County.

It was further stated by plaintiff, Chicago Bank's counsel, in his said statement, that the Chicago Cattle Loan Company was a corporation, organized under the laws of West Virginia, having its offices and principal place of business at Chicago, and that the offices of the Chicago Cattle Loan Company are also the offices of the

plaintiff, Chicago Bank; that in February, 1901, the Chicago Cattle Loan Company owned said mortgage and notes made by said Grimes on said cattle, in October, 1900, and being such owner of said last mortgage, said Chicago Cattle Loan Company, together with the plaintiff, Chicago Bank, sent a representative to Ashland, Kansas, to examine the records of said Clark County, Kansas, and that the records disclosed, in February, 1901, that there were no unreleased mortgages against said cattle, and that the said mortgage so made in October, 1900, and owned by said Chicago Cattle Loan Company, was a first lien upon the said cattle, and that when said last mortgage, which was made in October, 1900, matured in April, 1901, the mortgage, under which said plaintiff, Chicago Bank, now claims, was given as a renewal of that mortgage, so made in October, 1900.

It was further stated by counsel for plaintiff, Chicago Bank, in his said statement, that both the defendant, Geneseo Bank, and the plaintiff, Chicago Bank, took their resepctive papers in good faith and that they both relied upon the fact that they were holding first mortgages.

In the statement of the defendant, Geneseo Bank's counsel, it was stated that since the defendant Geneseo Bank's mortgage was prior to the mortgage of the plaintiff, Chicago Bank, if any satisfaction of the defendant, Geneseo Bank's mortgage had been made, it was by the Siegel-Sanders Live Stock Commission Company, without the authority or consent of the defendant, Geneseo Bank, and that the mortgage of the defendant, Geneseo Bank, being unpaid and unsatisfied, said Siegel-Sanders Live Stock Commission Company had no authority to release said last chattel mortgage.

It was agreed by both parties that both mortgages held by both plaintiff and defendant Banks were prop-

erly executed and properly recorded, according to the laws of Kansas (p. 42, Record).

Said agreement was in substance as follows:

That on June 27th, 1900, W. B. Grimes, Jr., made a mortgage bearing date of the date last aforesaid, to the Siegel-Sanders Live Stock Commission Company, on 526 head of cattle, securing one promissory note for $11,111.23, dated June 27th, 1900, and payable November 1st, 1900, said mortgage being acknowledged before M. G. Stevenson, on July 5th, 1900, and filed for record in the office of the register of deeds in Clark County, Kansas, on the 12th day of July, 1900, and duly recorded in Book 6, deed record at page 27 theerof, that said chattel mortgage was duly stamped with the proper amount of revenue stamps.

That the mortgage held by the plaintiff, Chicago Bank, was executed by W. B. Grimes, Jr., in Clark County, Kansas, dated April 17th, 1901, and securing two promissory notes, each for the sum of $7,694.77, of even date with said mortgage, payable October 27th, 1901, to the "Siegel-Sanders Live Stock Company," executed by W. B. Grimes, Jr., as mortgagor, to the Siegel-Sanders Live Stock Commission Company, as mortgagee; that said last mortgage was filed for record in the office of the register of deeds of Clark County, on April 25th, 1901, and duly recorded in book 6, at page 132; that said last mortgage was duly acknowledged by said W. B. Grimes, Jr., before M. G. Stevenson, a notary public of Clark County, Kansas, on April 19th, 1901.

It was further agreed that both of said mortgages were executed, delivered and recorded in compliance with the laws of the State of Kansas then in force; that at the date of the execution of said mortgages, and each of them, the cattle described in said mortgages, and each of them, were then in Clark County, Kansas, and that W. B. Grimes, Jr., the mortgagor in both of said mortgages, at the time of the execution and delivery of

said mortgages, and each of them, was a resident of Clark County, Kansas, being a resident of Ashland in said county, and that said Grimes was the owner of said cattle at the time of the execution of each of said chattel mortgages; that said defendant, Geneseo Bank, claimed under said mortgage, dated June 27th, 1900, and that said plaintiff, Chicago Bank, claimed under said mortgage, dated April 17th, 1901.

It was further stipulated and agreed by the parties that said chattel mortgages last referred to were the same chattel mortgages, true copies of which are attached to the original petition of the plaintiff, Chicago Bank, and to the answer of the defendant, Geneseo Bank. That said amended petition refers to the copies attached to the original petition and makes said copies a part of the amended petition, and that said amended answer refers to the chattel mortgage attached to the original answer.

It was further stipulated that said note, given for the sum of $11,111.23, dated June 27th, 1900, and due November 1st, 1900, which is held by said defendant, Geneseo Bank, and which is secured by said chattel mortgage dated June 27th, 1900, was and still is unpaid and due, and that at the time of the commencement of this suit the said chattel mortgage, bearing date June 27th, 1900, held by said defendant, Geneseo Bank, was less than one year old, and that according to the laws of the State of Kansas a chattel mortgage remains a lien upon the property therein described for one year from the date of the filing thereof in the office of the register of deeds, unless theretofore properly released (p. 43, Record).

It was also agreed by the parties that the said two promissory notes, dated April 17th, 1901, and due October 27th, 1901, and each for the sum of $7,694.70, and each being signed by W. B. Grimes, Jr., and payable to the order of Siegel-Sanders Live Stock Commission Com-

pany, were, at the date of the commencement of this suit, and still are due and unpaid (p. 43, Record).

It was further stipulated by the parties that said note for $11,111.23, held by the defendant, Geneseo Bank, was and had been, since about the month of July, 1900, held and owned by said defendant, Geneseo Bank, as well as the said chattel mortgage bearing date June 27th, 1900, and that said last note and chattel mortgage had been in the possession of said defendant, Geneseo Bank, continuously since the month of July, 1900, (p. 44, printed Record).

It was further stipulated by the parties that said two notes, bearing date April 17th, 1901, and due October 27th, 1901, each for the sum of $7,694.77, being the notes secured by the chattel mortgage, dated April 17th, 1901, and recorded April 25th, 1901, were and have been, since the date of April 17th, 1901, held and owned by plaintiff, Chicago Bank, and that said chattel mortgage securing said notes has, since the said 27th day of April, 1901, been continuously held and owned by said plaintiff, Chicago Bank, and that at the time of the commencement of this suit nothing had been paid on the said notes, or either of them, and it was further stipulated that neither the note owned by the defendant, Geneseo Bank, nor the notes owned by the plaintiff, Chicago Bank, have, nor has any part of them, been paid.

At this point the mortgage held by plaintiff, Chicago Bank, together with the acknowledgement and the certificate of the register of deeds recording the same, were offered and read in evidence (pp. 44 to 48 of the Record).

Said last mortgage is dated April 17th, 1901, is signed by W. B. Grimes, Jr., and secures said two notes, given each for the sum of $7,694.77. It was acknowledged by Grimes on April 19th, 1901, before a notary

public, and the certificate of the register of deds shows that it was recorded on April 25th, 1901.

Said two notes, dated April 17, 1901, for $7,694.77 each were also offered and read in evidence (p. 48, Record). Said two notes bear on the back thereof an endorsement as follows:

> "For value received we hereby assign this note to the National Live Stock Bank of Chicago, or order, and waive demand, notice and protest of same, and guarantee payment thereof at maturity."
>
> Signed by the Siegel-Sanders Live Stock Commission Company.

It was further stipulated and agreed by the parties that the cattle described in these mortgages, held by the plaintiff and defendant Banks, were removed from Clark County, Kansas, to Woodward County, Oklahoma, between April 25th, 1901, and May 1st, 1901, without the knowledge or consent of either the plaintiff or defendant Banks, and without the knowledge or consent of the Siegel-Sanders Live Stock Commission Company, and that on or about May 19th or 20th, 1901, the defendant, Geneseo Bank, by its representative, demanded from said Grimes, who was in possession of said cattle, that he turn over to its representative said cattle mentioned in said mortgage held by said Geneseo Bank, and that pursuant to said demand, said Grimes, on May 19th or 20th, 1901, did turn over the possession of said cattle, or so much thereof as could be identified, to said defendant, Geneseo Bank, or its representative or agent.

It was further stipulated and agreed by the parties that prior to the commencement of this suit the plaintiff, Chicago Bank, demanded from the defendant, Geneseo Bank, which was in the possession of the cattle mentioned and described in the mortgages of both the plaintiff and defendant, that said defendant, Geneseo Bank,

turn over to the plaintiff, Chicago Bank, the possession of the cattle therein metnioned and described, it being further stipulated and agreed that the cattle mentioned and describd in the chattel mortgage so held by defendant, Geneseo Bank, and described in the mortgage held by the plaintiff, Chicago Bank, were one and the same, and that said cattle are also the same cattle as the ones which were taken on the order of delivery in this suit.

It was further stipulated and agreed that said defendant, Geneseo Bank, prior to the commencement of this suit, refused to surrender the possession of said cattle to the plaintiff, Chicago Bank, upon said demand so made. That the number of cattle in the mortgage of the defendant, Geneseo Bank, was 526, and the number in the mortgage owned by the plaintiff, Chicago Bank, was 606, but that the 526 head secured and described in the mortgage held by the defendant, Geneseo Bank, are included in the 606 head described in the mortgage held by the plaintiff, Chicago Bank.

It was further stipulated and agreed that said Grimes acquired the difference in the number of cattle covered by the two mortgages, that is to say, eighty head of cattle, between the date of the execution of the mortgage held by the defendant, Geneseo Bank, to-wit., June 27th, 1900, and the date of the mortgage held by the plaintiff, Chicago Bank, which was April 17th, 1901 (p. 50, Record).

The note given June 27th, 1900, by W. B. Grimes, Jr., payable November 1st, 1900, to the order of Siegel-Sanders Live Stock Commission Company, for the sum of $11,111.23, and which, as appears above, was transferred to and became the property of the defendant, Geneseo Bank, was offered in evidence, and is copied in full at pages 108 and 109 of the Record. Said note is payable to the order of Siegel-Sanders Live Stock Commission Company and is for the payment of the definite sum of

$11,111.23. There is no controversy that said note was and is a negotiable promissory note. It is the same note pleaded by the defendant, Geneseo Bank, in its answer to the amended petition. The endorsement, assignment and transfer of that note and guaranty of its payment by Siegel-Sanders Live Ctock Commission Company may also be found copied with the note at page 148 of the Record.

The chattel mortgage dated June 27, 1900, for the cattle in controversy, which was given to secure said note for $11,111.23, and which is pleaded by the defendant, Geneseo Bank, in its answer, may also be found in the evidence, and is copied in full, from page 109 to page 112 of the printed Record.

With said copy of said mortgage and the acknowledgment thereof also appears a certificate by the register of deeds of Clark County, Kansas, of its filing in his office on July 12th, 1900.

Although this mortgage held by the defendant, Geneseo Bank, and the note which it was given to secure, above referred to, were and are admitted to be valid instruments creating a lien on the cattle in controversy, and although the note and mortgage so held by the defendant, Geneseo Bank, as agreed by the parties as above stated, have never been paid, but remain wholly due and unpaid, it was the contention in the court below and is the contention here, that said note and mortgage for $11,111.23, although owned and held continuously since July, 1900, by the defendant, Geneseo Bank, as agreed by the parties as above stated, and although, as above stated, it is agreed that said note and mortgage were never paid but remain wholly due, was discharged by the unauthorized release four months after defendant bought them, which was given by the Siegel-Sanders Live Stock Commission Company and placed on record November 27th, 1900.

Said release was offered in evidence by the plaintiff, Chicago Bank, and admitted by the court. Said release appears at pages 62 and 63 of the Record. It does not recite the payment of the note. Said release is dated November 24th, 1900, and purports to have been signed by Siegel-Sanders Live Stock Commission Compay, by Frank Siegel, president, with the seal of said company affixed, and was filed for record with the register of deeds of Clark County, Kansas, on November 27th, 1900.

The contention in the court below was, and the contention here will be over the effect of this release.

To the admission in evidence of said release by the trial court, objections in various forms were made and exceptions were saved by the defendant, Geneseo Bank. Those objections and exceptions may be found at pages 50, 51, 52, 61, 62, 64, 71 and other pages of the Record.

It was not denied in the trial Court by the plaintiff, Chicago Bank, nor by its counsel, that said release was invalid as to the defendant, Geneseo Bank, and it was proven by the plaintiff, Chicago Bank, through its counsel, by an attorney at law of the State of Kansas, that said release was invalid as to the holder of a negotiable promissory note, such as the one that is held by the defendant, Geneseo Bank, in this case. (P. 106, printed Record).

In the trial Court, plaintiff, Chicago Bank, by its attorney, put on the stand one Thornton W. Sargent, an attorney at law of Wichita, Kansas, and attempted to prove the law of Kansas on the subject of chattel mortgages in that state. Since the law of Kansas on the subject of releasing chattel mortgages is regulated and fixed by statute, Mr. Sargent was not permitted by the trial Court to give testimony as to what the law was, but, at the instance of the plaintiff, Chicago Bank, Mr. Sargent

was permitted to state that the release of a chattel mortgage would not be good as against the assignee of a negotiable promissory note secured by said mortgage (p. 106, printed Record). And it was practically conceded in the trial Court by the plaintiff, Chicago Bank, and its attorneys, that the release in this case by Siegel-Sanders Live Stock Commission Company, of defendant, Geneseo Bank's note and mortgage, was invalid as to the defendant, Geneseo Bank, but that it became valid as to plaintiff, Chicago Bank, because of the fact, claimed by the plaintiff, Chicago Bank, that said plaintiff, Chicago Bank, was an innocent purchaser for value, without notice of the holding by said defendant, Geneseo Bank, of its said note and mortgage.

The case in the Court below on the first trial was made to turn upon this proposition, that the plaintiff, Chicago Bank, was an innocent purchaser for value, without notice of defendant's holding of its note and mortgage, and the decision and judgment of the Court below, in favor of the plaintiff, Chicago Bank, on the first trial, was based upon the holding by the Court that the plaintiff, Chicago Bank, was such innocent purchaser for value, without notice.

The evidence bearing upon this question of plaintiff, Chicago Bank, being an innocent purchaser for value, without notice, is as follows:

On October 17th, 1900, said W. B. Grimes, Jr., executed and delivered to Siegel-Sanders Live Stock Commission Company two notes and a chattel mortgage, in attempted renewal of said note and mortgage held by the defendant, Geneseo Bank. This renewal mortgage is referred to in the opening statment of facts by counsel of plaintiff, Chicago Bank, at page 39 of the printed Record, in the following language, to-wit:

> "On the 24th day of October, 1900, the mort-
> "gagor in the first mortgage, W. B. Grimes, exe-

"cuted another mortgage upon the same cattle, and "some more in addition thereto, making in all 633 "head of cattle, being identified in the several marks "of brand on the left hip. * * * *

"The mortgage to which I have last referred was "filed for record in the office of the register of deeds "of Clark county, Kansas, on the 27th day of Octo- "ber, 1900. The mortgage last referred to secured "two promissory notes due 6 months after date or "April 17th, 1901, one of those notes being for $7,- "000.00 and the other for $7,033 and some cents. "Afterwards, and on the 17th day of April, 1901, "Grimes executed a third chattel mortgage to se- "cure two notes due six months after date or on "October 17th, 1901. The two notes aggregated a "little over $15,000.00."

This mortgage which was made in October, 1900, is referred to in the testimony of the witnesses and in the questions of the plaintiff, Chicago Bank's counsel, at pages 60, 85, 86-87 of the printed Record.

These renewal notes and the chattel mortgage given by Grimes in October, 1900, were sold by Siegel-Sanders Live Stock Commission Company to the Chicago Cattle Loan Company. The Chicago Cattle Loan Company had its offices in Chicago in the same offices of the plaintiff, Chicago Bank, and the officers of said Chicago Cattle Loan Company were the same as the officers of the plaintiff, Chicago Bank. The testimony shows that the Chicago Cattle Loan Company was practically an annex of the plaintiff, Chicago Bank. See pages 40, 83, 86-87-88 and 89 to 94 of the printed Record.

Thus at page 40 of the Record, plaintiff, Chicago Bank's counsel, in his opening statement, used the following language:

> "I might say by way of history, and it will also come out in the evidence, that the Chicago Cattle Loan Company is a corporation, organized

under the laws of West Virginia, having its office and place of business at Chicago, and that the offices of the Chicago Cattle Loan Company are also the offices of the National Live Stock Bank of Chicago, the plaintiff. That in the month of February, 1901, the Chicago Cattle Loan Company and the plaintiff bank, the Cattle Loan Company at that time owning the mortgage which we claim was and is a mortgage on the cattle, sent a representative to Ashland, Kansas, to examine the records, and the records disclosed at that time that there were no unreleased mortgages against the property, and that the mortgage then owned by the Chicago Cattle Loan Company was a first lien upon the property, and that when this mortgage matured, it was in April, 1901, the mortgage under which we now claim was a renewal of that mortgage and the difference in the amount of the mortgage. The cattle company mortgage is on this side of fourteen thousand dollars and some cents and the present mortgage is for a little upwards of fifteen thousand dollars, being accounted for in addition to the loan, in the feeding expenses and interest."

Again, at page 83 of the Record, Mr. C. H. True, who is a cattle inspector of both the Chicago Cattle Loan Company and the plaintiff, Chicago Bank, testified as follows:

Q. Were you in the services of the Chicago Cattle Loan Company and the National Live Stock Bank in the month of February, 1901? A. Yes, sir.

Q. And continuously since that time? A. Yes, sir.

Q. What was your duty and business as inspector? A. My duty was to attend to the field work; make inspections of loans for them.

Q. What do you mean by inspecting loans? A. I received from the Bank or Cattle Loan Company—I received from the National Live Stock Bank or the Chicago Cattle Loan Company, for

both of whom I worked, slips or orders, giving the number of their loan, the amount of money, the name of the mortgagor and mortgagee and a description of the property mortgaged.

Q. State whether or not you ever visited Ashland, Kansas, with reference to the loan of W. B. Grimes? A. I did, sir.

Q. State when, or about, was that visit? A. I reached Ashland on the 21st of February and remained there until the 25th of February, 1901.

Again, at pages 86 and 87 of the Record, the counsel of the plaintiff, Chicago Bank, in response to a question by the Court, in speaking of the mortgage held by the defendant, Geneseo Bank, which was given June 27th, 1900, used the following language:

"Subsequent to that, on October 17th, there was a new mortgage made, which the cattle loan company had, for $14,000, and that was the mortgage which Mr. True went there at that time to inspect, and subsequently, on the 17th day of April, 1901, our mortgage was executed, under which we claim in this suit."

By the Court: "I thought Mr. True was representing your mortgage?" A. "He does; he says he represents the Chicago Cattle Loan Company and the National Live Stock Bank both; I will prove by him that their offices are together, and that he went there in February to examine the security pledged to the Chicago Cattle Loan Company by this mortgage, the one dated October 17th, 1900; that mortgage came due in April, 1901, and was renewed, or a new mortgage given in place of it, which is the mortgage we claim under in this suit, and the mortgage we claim under bears date about April 17th, 1901."

By the Court: "Then it was a second mortgage; was a renewal mortgage of a previous debt?"

By Mr. Strawn: "Yes, sir."

By the Court: "What I first suggested was the point that Mr. True was investigating a loan already made?"

By Mr. Strawn: "Yes, sir."

By the Court: "Now, if I understand your statement, the mortgage which was executed to secure that loan, and another mortgage, or a second mortgage made to secure the same loan?"

By Mr. Strawn: "Yes, sir."

By the Court: "And that is the mortgage under which you are claiming?"

By Mr. Strawn: "That is right."

Again, at page 85, said October, 1900, mortgage was referred to by plaintiff, Chicago Bank's counsel, by the following question:

Q. "I refer now to the mortgage which was at that time owned by the Chicago Cattle Loan Company, which bore date of about October 17th, 1900."

At page 89 of the Record may be found the testimony of Levy P. Doud, who was president of the plaintiff, Chicago Bank, and vice-president of the Chicago Cattle Loan Company.

Again, at pages 90 and 91 of the Record, appears the following question and answer in the testimony of Mr. Doud:

Q. "There has been introduced in evidence a certified copy of a chattel mortgage purporting to have been given by W. B. Grimes, Jr., to the Siegel-Sanders Live Stock Commission Company under date of October 24th, 1900, securing his notes of like date, for sums of $7,033.24 and $7,000, each due six months after date, and cover 633 head of native cattle; what, if anything, did you ever have to do as the representative of the Chicago Cattle Loan Company with that mortgage and the notes secured thereby? A. I approved of the Cattle Loan Company buying that paper with the chattel mortgage on the cattle as security for the same.

Q. At or about what time? A. *In October or the early part of November,* 1900."

It thus appears that the Chicago Cattle Loan Company bought said notes and mortgage which were made in October, 1900, either in said month of October or the early part of November, 1900, and as the release which was given by Siegel-Sanders Live Stock Commission Company, attempting to release the mortgage held by the defendant, Geneseo Bank, was filed for record on November 27th, 1900, it results from the foregoing testimony of President Doud that the purchase and payment by the Chicago Cattle Loan Company was prior to the recording of said release, and that said purchase by said Chicago Cattle Loan Company was not made upon the faith of or reliance of said Chicago Cattle Loan Company upon said release. The testimony of President Doud at page 91 of the Record is conclusive that said Chicago Cattle Loan Company bought and paid for and became the owner of said notes and mortgage given in October, 1900, either in *"October or the early part of November,* 1900."

And the testimony of Inspector True (p. 83, Record) and the testimony of President Doud (p. 89, Record) show that the inspection of Mr. True in February, 1901, was after said purchase in October or the early part of November, 1900, by the Chicago Cattle Loan Company.

It is thus made manifest that the purchase of the note and mortgage by the Chicago Cattle Loan Company was not made upon the faith of the subsequent report made in the following February, 1901, by Inspector True.

It is also thus made manifest that the purchase made by the Chicago Cattle Loan Company of the notes and mortgage given in October, 1900, was not made upon the basis of the recorded release, which was recorded a month or so after that purchase.

With regard to the notes and mortgage in this suit relied upon by the plaintiff, Chicago Bank, which, as we have already seen, were in renewal of the notes and mortgage given in October, 1900, President Doud testified as follows:

> "Q. State what, if anything, you gave to the Siegel-Sanders Live Stock Commission Company on the 27th day of April, 1901, in consideration for the two notes and chattel mortgage you have just described? A. We credited their account for the amount of the notes, less the discount." (Page 92, Record).

See to the same effect the testimony of Frank P. Swain, at page 94 of the Record.

This testimony shows that there was some bookkeeping by both the Chicago Cattle Loan Company and the plaintiff, Chicago Bank, at the time of the renewal of the notes and mortgage in April, 1901, but there is nothing in the evidence to show that the giving of the renewal to the plaintiff Bank was in anywise different from what the transaction would have been if the renewal had been given to the Chicago Cattle Loan Company instead of to the plaintiff, Chicago Bank.

The circumstances attending the purchase of those notes and the mortgage given in October, 1900, by the Chicago Cattle Loan Company, were given in the deposition of Frank P. Swain at pages 94 to 98 of the printed Record. Mr. Swain had charge of the offices of Siegel-Sanders Live Stock Commission Company in Chicago, and the transaction of the purchase by the Chicago Cattle Loan Company of the notes and mortgage in October or the early part of November, 1900, from Frank P. Swain, who had charge of Siegel-Sanders Live Stock Commission Company's office in Chicago, took place at Chicago, and there is nothing to show in the evidence that there was any examination of the records of the

register of deeds office in Clark county, Kansas, prior to the examination made by Inspector True, in February, 1901, or that plaintiff Bank called for any information from Swain at the time of its purchase.

In the trial of the case in the trial Court Mr. Menferd Brown, who is the register of deeds of Clark county, Kansas, was called to testify, and at pages 69 and 70 of the Record it appears that among other questions Mr. Brown was asked the following:

> "Q. Were assignments for either of the mortgages you have referred to ever filed in the office o the register of deeds of Clark county, Kansas?
>
> This question was objected to by counsel for the defendant, Geneseo Bank, for the reason that it is incompetent, irrelevant and immaterial, and not required under the statutes of Kansas. This objection was by the Court overruled and the defendant, Geneseo Bank, at the time excepted? A. No, sir.
>
> Q. Were assignments for either of them ever given you to be filed? A. No, sir.
>
> Q. Where do you make a record of notation of assignments of chattel mortgages which are filed with you for record? A. *I have never had one filed; if I should I would make a note of it as I do releases or renewal and attach it to the original instrument.*"

The said mortgage made April 17th, 1901, and held by the plaintiff, Chicago Bank, was offered in evidence by plaintiff's counsel (p. 65, Record).

POINTS AND AUTHORITIES.

I.

This case should have been brought to this court by appeal and not by writ of error, and the writ of error should be dismissed.

Stringfellow v. *Cain*, 99 U. S., 610, l. c., 612-613-614;
Davis v. *Fredericks*, 104 U. S., 618-619;
Neslin v. *Wells*, 104 U. S., 428;
Hecht v. *Boughton*, 105 U. S., 235;
United States v. *Railroad Co.*, 105 U. S., 263;
Gray v. *Howe*, 108 U. S., 12;
Story v. *Black*, 119 U. S., 235;
Idaho Land Co. v. *Bradbury*, 132 U. S., 509, l. c., 513;
Gregory Mining Co. v. *Starr*, 141 U. S., 222;
San Pedro Co. v. *United States*, 145 U. S., 130;
Mining Co. v. *Machine Co.*, 151 U. S, 447;
Bonnifield v. *Price*, 154 U. S., 672;
Hawes v. *Mining Co.*, 160 U. S., 303;
Grayson v. *Lynch*, 163 U. S., 468;
Young v. *Amy*, 171 U. S., 179;
Marshall v. *Burtis*, 172 U. S., 630;
Cohn v. *Daly*, 174 U. S., 539.

II.

Even if this case were here on appeal instead of by writ of error, this court is without jurisdiction to consider the case, because there is no finding of facts in the nature of a special verdict by either the Supreme Court of Oklahoma or the District Court of Woodward county, Oklahoma. This is necessary to give this court juris-

diction. The statement of facts in the opinion of the Oklahoma Supreme Court on the first hearing does not constitute a finding of facts in the nature of a special verdict.

Dickinson v. *Bank,* 16 Wall., 250, l. c., 252-256;
Lahner v. *Dickson,* 148 U. S., 71, l. c., 74;
Saltonstall v. *Birtwell,* 150 U. S., 417;
Stone v. *United States,* 164 U. S., 380;
Kentucky Life Ins. Co. v. *Hamilton,* 63 Fed. Rep., 93; 11 C. C. A., 42;
Minchen v. *Hart,* 72 Fed. Rep., 294; 18 C. C. A., 570;
National Masonic Ass'n v. *Sparks,* 83 Fed. Rep., 225; 28 C. C. A., 399, l. c., 403;
Mutual Reserve Ass'n v. *DuBois,* 85 Fed. Rep., 586; 29 C. C. A., 254.

III.

On the facts shown by the record in this case and recited in our statement of facts, the Chicago Bank was not a subsequent purchaser *bona fide* for value without notice of its notes and mortgages.

Vol. 1 Ency. Plead. & Prac., p. 880;
Boone v. *Childs,* 10 Pet., 177, l. c., 211;
Vol. 2 Pomeroy Eq. Jurisp. (2nd Ed.), Secs. 784-785;
Holdswosth v. *Shannon,* 113 Mo., 508, l. c., 524;
Ins. Co. v. *Smith,* 117 Mo., 261, l. c., 293.

IV.

It is conceded that the Geneseo Bank had no actual knowledge of the filing of the release or of the filing of the mortgage under which the Chicago Bank claims.

That release and the mortgage of the Chicago Bank were filed and recorded months after the filing and recording of the mortgage of the Geneseo Bank. It is well settled that a prior mortgagee is not affected with constructive notice of any instrument made and filed by his mortgagor subsequent to the filing of his mortgage.

Tydings v. *Pitcher*, 82 Mo., 379;
Meier v. *Meier*, 105 Mo., 412, l. c., 433;
Sensenderfer v. *Kemp*, 83 Mo., 582;
Ford v. *Church Ass'n.*, 120 Mo., 498, l. c., 516;
2 Jones on Mortgages, Sec., 1624.

The general principle applicable to the registry laws of the different states upon the point of notice is that the registering of instruments is notice to subsequent purchasers and encumbrancers only. The filing for record of the unauthorized and void release of the mortgage held by the Geneseo Bank and the filing for record of the mortgage held by the Chicago Bank were, therefore, not notice to the Geneseo Bank which held under a prior recorded mortgage.

Ackerman v. *Hennicker*, 85 N. Y., 43, l. c., 50;
Gen. St. Kans., 1899 (Dassler's Compilation), Sec. 4060-4062, p. 842;
Rowen v. *Mfg. Co.*, 29 Conn., 282, l. c., 325;
Schmidt v. Zahrndt, 148 Ind., 447, l. c., 451;
Tapia v. *Deamartini*, 77 Cal., 383, l. c., 387;
Nelson v. *Boyce*, 7 J. J. Mar. (Ky.), 401; l. c., 404;
Ward v. *Cooke*, 17 N. J. Eq., 93, l. c., 99;
Shirras v. *Craig*, 7 Cranch., 34, l. c., 51;
Trust Co. v. *Iron Works*, 51 N. J. Eq., 605, l. c., 607;
Summers v. *Roos*, 42 Wis., l c., 778;
Witzzinski v. *Everman*, 51 Miss., 841;
George v. *Wood*, 9 Allen, 80, l. c., 83;
McDaniels v. *Cohn*, 16 Vt., 300, l. c., 306;
Seymour v. *Darrow*, 31 Vt., 122, l. c., 134.

V.

While the real estate mortgage laws of Kansas contain ample provisions for the assignment of a real estate note and mortgage, no provision has ever been enacted by the Kansas Legislature authorizing or permitting the making and recording of an assignment of a chattel mortgage and there has been no law at any time in that State which authorized or permitted the Genesoe Bank to obtain and record an assignment of its chattel mortgage. Dassler's Statutes of Kansas, 1899, p. 842-845, Secs. 4060-4078. Therefore, the law is with the Geneseo Bank.

The Statutes of Kansas, in relation to real estate mortgages containing the provision authorizing the filing and recording of assignments of real estate mortgages, may be found in the same volume of the Kansas Statutes from p. 837 to p. 842. See also:

Carpenter v. *Langan*, 16 Wall., 271;
Burhaus v. *Hutchinson*, 25 Kas., 625;
Insurance Co. v. *Huntington*, 57 Kans., 744;
Bronson v. *Ashlock*, 7 Kans. App., 255-259;
Swift v. *Smith*, 102 U. S., 442;
Railway Co. v. *Bank*, 136 U. S., 283;
Jones on Chattel Mortgages, Sec. 662 (a)-633;
Biggerstaff v. *Marstin*, 161 Mass., 101;
Watson v. *Wyman*, 161 Mass., 106;
Mulcahy v. *Fenwick*, 161 Mass., 164;
Hoffman v. *Boteler*, 87 Mo. App., 316;
Brooke v. *Struthers*, 68 N. W. Rep., 272;
Lee v. *Clark*, 89 Mo., 553;
Hagerman v. *Sutton*, 91 Mo., 519, l. c., 532;
Swift v. *Bank of Washington*, 104 Fed. Rep., 643;
Cummings v. *Hurd*, 49 Mo. App., 139;
Walter v. *Logan*, 63 Kans., 193;

20 Am. & Eng. Enc. Law (2nd Ed.), 1045-1046;
Robinson v. *Campbell*, 60 Kans., 60;
De Laurel v. *Kemper*, 9 Mo. App., 77;
Lakeman v. *Roberts*, 9 Mo. App., 179;
Bank v. *Buck*, 71 Vt., 190;
Parker v. *Randolph*, 5 S. D., 54—;
Williams v. *Paysinger*, 15 S. C., 171;
Black v. *Reno*, 59 Fed. Rep., 917;
Brewer v. *Atkeison*, 121 Ala., 410;
Roberts v. *Halstead*, 9 Pa. St., 32;
Anderson v. *Karaider*, 52 Neb., 171;
Kelon v. *Smith*, 97 Ill., 156;
Stiger v. *Bent*, 111 Ill., 329;
Preston v. *Morris*, 2 Ia., 549;
Martindale v. *Burch*, 57 Ia., 291;
Tandercosk v. *Baker*, 48 Ia., 199;
Gordon v. *Mulhore*, 13 Wis., 22;
Demoth v. *Bank*, 85 Md., 315;
Laping v. *Duffy*, 47 Ind., 51;
Dixon v. *Hinter*, 57 Ind., 278;
Reeves v. *Hayes*, 95 Ind., 521;

These authorities fully vindicate and support the proposition that where there is no law authorizing the holder of a negotiable note secured by a mortgage to put on the record an assignment of the mortgage, the subsequent release of that mortgage by the original mortgagee and the subsequent conveyance or mortgage by the mortgagor to a third party are unavailing as against the holder of the first mortgage note.

VI.

Sec. 4246 of the Chattel Mortgage Law of Kansas (Dassler's Statutes of 1901, p. 896), provides that every holder of a mortgage may keep his mortgage alive by fil-

ing an affidavit during the last thirty days of the year following the recording of his mortgage, and since the Chicago Bank took its mortgage within the year and before the time had arrived when the Geneseo Bank could file the affidavit contemplated by that provision, it follows that the Chicago Bank, in view of that statute, is not a subsequent purchaser or mortgagee in good faith.

Meech v. *Patchen*, 14 N. Y., 71;
Howard v. *Nat'l Bank*, 44 Kansas, 549;
Bank v. *Bank*, 46 Kans, 376.

The Chattel Mortgage Law of Kansas, in all its provisions, recognizes the transferee of a negotiable note secured by a chattel mortgage as the "assignee," where the word "assignee" is used in that statute. Secs. 4068-4069, p. 844, of Dassler's Kans. Stat. of 1899, provide, as follows:

> "After condition broken, the mortgagee *or his "assignee*, may proceed to sell the mortgaged prop- "erty, or so much thereof as may be necessary to "satisfy the mortgage and costs of sale, having first "given notice of the time and place of sale by writ- "ten or printed handbills posted up in at least four "public places in the township or city in which the "property is to be sold, at least ten days previous "to the sale."
>
> "If the mortgagee *or his assignee* shall have "obtained possession of the mortgaged property, "either before or after condition broken, the mort- "gagor or any subsequent mortgagee may demand "in writing a sale of such property. In such case "the mortgagee shall proceed to sell the property, "having first given the same notice as provided in "the preceding section."

The case of *Bohart* v. *Buckington*, 62 Kans., 658, is an express adjudication by the Kansas Supreme Court that the original mortgagee in a chattel mortgage, after

he endorses and transfers the negotiable note secured by the mortgage, has no beneficial interest in the mortgage and cannot maintain an action of replevin or trover in his own name, but such action must be brought by the transferee of the negotiable promissory note as the real holder and owner of the note and mortgage and therefore as being the "assignee" within the meaning of the Kansas chattel mortgage statute. See also:

Wiscum v. *Huberly*, 51 Kans., 580.

VII.

The release of the mortgage of the Geneseo Bank was void because the same was not acknowledged. It was improperly recorded for that reason. What is said by the Supreme Court of Oklahoma in its opinion in this case, commencing at p. 147 of the printed record herein, fully covers this point.

ARGUMENT.

I.

We will first consider the attitude of the plaintiff, Chicago Bank, with reference to its claim of being an innocent, *bona fide* purchaser for value, without notice of the defendant Geneseo Bank's title to the cattle in question.

It will not be denied by counsel for plaintiff, Chicago Bank, that the title of the defendant, Geneseo Bank, was good in its inception, and so continued thereafter, and that it is still good as against everybody except a subsequent, innocent, *bona fide* purchaser for value, without notice. We shall discuss in the third point of this argument the proposition that the title of the defendant, Geneseo Bank, is good, even as against a subsequent, innocent, *bona fide* purchaser for value, without notice, and we shall assume the affirmative of that proposition, namely, that it is a good title as against a subsequent innocent, *bona fide* purchaser for value, without notice, who purchased after and on the faith of said release.

But if the plaintiff, Chicago Bank, does not have the right in this case, upon the pleadings and the evidence, to maintain the claim that it is a subsequent innocent, *bona fide* purchaser for value, without notice, that is the end of the case, and judgment must go for the defendant, Geneseo Bank.

The admitted facts show that the mortgage held by the defendant, Geneseo Bank, was made and recorded in accordance with the laws of Kansas, in the months of June and July, 1900, and it was agreed and stipulated at the trial, among other facts brought out in the evidence, that said note and mortgage became the property

of the defendant, Geneseo Bank, and have been owned and possessed by it ever since the month of July, 1900. Said note held by the defendant, Geneseo Bank, was and is negotiable, being payable to order, and was endorsed and guaranteed by Siegel-Sanders Live Stock Commission Company. It results, therefore, that the release given by Siegel-Sanders Live Stock Commission Company in November, 1900, four months after defendant Bank became its owner, was wholly unauthorized and invalid as to the defendant, Geneseo Bank, and there is no pretense in the case that Siegel-Sanders Live Stock Commission Company was the agent, for any purpose, of the defendant, Geneseo Bank.

Said release was, therefore, void, both in law and in fact.

But the attitude of the plaintiff, Chicago Bank, is, that that release acquired validity as against the defendant, Geneseo Bank, in favor of the plaintiff Bank, because of the attitude claimed for the plaintiff, Chicago Bank, that it was a subsequent innocent, *bona fide* purchaser for value without notice.

If the plaintiff, Chicago Bank, is not entitled in this case, on the pleadings and evidence, to maintain that proposition, then, as before stated, that is the end of the case, and the judgment must be affirmed.

Now, at the very threshold of the case, it will be observed that there is nothing said by plaintiff, Chicago Bank, in any of its pleadings about its claim of being a subsequent innocent, *bona fide* purchaser for value, without notice. The prior valid title of the defendant, Geneseo Bank, is fully disclosed in its answer (p. 23, Record), and was admitted by the parties at the trial. And if the plaintiff, Chicago Bank, had intended, in framing its reply, to rely upon the claim of its being a subsequent innocent, *bona fide* purchaser for value, without notice, it

should have been pleaded in that reply; but said claim is not pleaded in any form or in any way referred to in the reply of plaintiff, Chicago Bank (p. 31, Record). On the contrary, the reply of the plaintiff, Chicago Bank, pleads that the note held by the defendant, Geneseo Bank, was, in fact, held by Siegel-Sanders Live Stock Commission Company at the time of its giving the release in question. The language of the reply is as follows:

> "That on, to-wit, the 24th day of November, A. D. 1900, said note being then the property of Siegel-Sanders Live Stock Commission Company, and due, the amount of the same was by the maker thereof, to-wit, W. B. Grimes, Jr., paid to said Siegel-Sanders Live Stock Commission Company by the execution and delivery to it of another note for about the sum of fourteen thousand dollars."

And then follows the averment of the reply that at the time of such payment being made, said Siegel-Sanders Live Stock Commission Company, the holder of the note so paid, executed the release in question.

This is the reply of the plaintiff, Chicago Bank, to the prior valid title shown by the defendant, Geneseo Bank, in its answer, but the undisputed and admitted facts in evidence show that this defense is wholly without support in the proof. It is a conceded fact, on the admissions of the counsel, and on the evidence, as we have seen in our statement, that the defendant, Geneseo Bank, owned and held said note from July, 1900, continuously.

Of course the defense pleaded in the reply of the plaintiff, Chicago Bank, that Siegel-Sanders Live Stock Commission Company was the owner of the note at the time of the payment to it by the renewal and the giving of the release by it, was a good reply on its face to the answer of the defendant, Geneseo Bank, but the trouble with that answer of the plaintiff, Chicago Bank, in its

reply was and is that it was not supported by the proof, but the plaintiff, Chicago Bank, in lieu and instead of that defense, relied on the trial below, and relies hereupon the claim of its being a subsequent innocent, *bona fide* purchaser for value, without notice.

We submit, in the first place, that plaintiff, Chicago Bank, must fail on this claim because it was not pleaded. The rule is as old as law and equity that where a party, that is a plaintiff or defendant, relies, in order to defeat the conceded title of his adversary, upon the claim of his being an innocent, *bona fide* purchaser for value, without notice, he must affirmatively plead the same in his pleadings in the case. Thus, in Vol. 1, Encyclopedia of Pleading and Practice, page 880, it is said:

> "The defense that defendant is a *bona fide* purchaser for a valuable consideration, without notice, may be taken by answer as well as by plea."

And in the leading case of *Boone* v. *Childs,* 10 Peters, pages 177, 211, the doctrine is expressly sanctioned by this Court, that where the claim of a party being an innocent purchaser for value, without notice, is relied upon, it must be pleaded, and in that connection it is said by this Court that in pleading the claim of innocent purchaser for value, without notice, it must be with a distinct averment that it was *bona fide* and the consideration truly paid, independently of the recital in the deed, and notice must be averred previous to and down to the time of paying the money and the delivery of the deed. Not only should it be pleaded, but it must be proved by the party pleading it.

And in Vol. II, Pomeroy's Equity Jurisprudence, 2nd Ed., Section 784, the doctrine is there recognized that both under the old equity system of pleading and under the code, where the claim of being an innocent purchaser for value, without notice, is relied upon, it must

be pleaded, and in Section 785, of the same work, it is stated that in pleading "innocent purchaser for value, without notice," the plea must show that the consideration has actually been paid, and not merely secured, and should also deny notice in the fullest and clearest manner, and this denial is necessary, whether the notice is charged in the complaint or not, or in the adverse pleadings.

An examination of these authorities will show that the plaintiff, Chicago Bank, has no right in this case to rely upon the claim of its being an innocent, subsequent, *bona fide* purchaser for value, without notice, because it has not pleaded the same.

See also:

Life Ins. Co. v. *Smith,* 117 Mo., pp. 261 to 293;

Holdsworth v. *Shannon,* 113 Mo., 508-524.

But if plaintiff, Chicago Bank, had properly pleaded the claim of its being a subsequent, innocent, *bona fide* purchaser for value, without notice, still it would fail because the evidence does not support that claim. The quotations that we have made in our statement of facts from the opening statement of plaintiff, Chicago Bank's counsel, and from the agreements and stipulations of counsel, and from the testimony of the witnesses, show that the money that was paid for the title obtained by the plaintiff, Chicago Bank, was paid, as testified to by President Doud, by the Chicago Cattle Loan Co., either in the month of October or the early part of November, 1900. That payment was made, therefore, before the recording of the release in question on November 27th, 1900, and as the money for the title of the plaintiff, Chicago Bank, was paid before the filing of the release in question, plaintiff, Chicago Bank, cannot claim to occupy the attitude of a subsequent, innocent, *bona fide* purchaser

for value, without notice. It did not make the payment after or on the faith of that release. The note and mortgage which were given in April, 1901, and which are now held by the plaintiff, Chicago Bank, were given, as we have seen from our statement, as a renewal of the note and mortgage purchased by the Chicago Cattle Loan Company in October or the early part of November, 1900. There is no pretense that any money was paid at the time of the renewal in April, 1901. It was simply a renewal of the note and mortgage given in October, 1900. It is true that President Doud, who was an officer of both the Chicago Cattle Loan Company and of the plaintiff Bank, testified (p. 89, Record), as did also Mr. Frank P. Swain (p. 94, Record), that the Siegel-Sanders Live Stock Commission Company received credit by the plaintiff Bank on the giving of the renewal note and mortgage in April, 1901, but this is not inconsistent with the idea of a simple renewal. It is probable that there were the usual bookkeeping entries made at the time of the renewal. This would naturally include, first, the debiting of Siegel-Sanders Live Stock Commission Company with the amount of the October, 1900, note and mortgage, when they matured in April, 1901, and when the renewal note and mortgage of April, 1901, were given, it was very natural, as President Doud and Mr. Frank P. Swain both testified, that a credit should also be given. This is all that was done, but this bookkeeping does not show that the plaintiff, Chicago Bank, parted with anything of value over and above what the Chicago Cattle Loan Company had paid for the note and mortgage in October, 1900, or the early part of November of that year.

The opening statement of the plaintiff Bank's counsel, the admissions and stipulations of the parties, and the evidence of President Doud and Inspector True, referred to in detail and by reference to pages of the Rec-

ord in our foregoing statement of facts, show that the Chicago Cattle Loan Company and the plaintiff, Chicago Bank, were one and the same. The case, therefore, stands before the Court, so far as the claim of paying the consideration is concerned, upon the payment made by the Chicago Cattle Loan Company in October, 1900, or the early part of November, 1900. A mere renewal of the paper in April, 1901, was not a payment of anything by either the Cattle Loan Company or the plaintiff Bank. On the undisputed facts it cannot be claimed as a matter of fact or of law that anything was paid by either the Cattle Loan Company or the plaintiff Bank after the filing of the release in question on November 27th, 1900.

An examination of the authorities that we have cited will show that the burden of bringing itself within the attitude claimed, of being a subsequent, innocent, *bona fide* purchaser for value, without notice, rests upon the plaintiff, Chicago Bank, in order to defeat the prior unquestioned and admitted good title of the defendant, Geneseo Bank. There is, as is required in such cases, no such distinct proof in this case on the part of the plaintiff, Chicago Bank, of a payment of anything of value after the recording of the release on November 27th, 1900, to authorize, even if it were in the pleadings, the plaintiff Bank to maintain this claim of its being a subsequent, innocent, *bona fide* purchaser for value, without notice. There is no proof whatever of such payment.

This being so, the defendant, Geneseo Bank, is entitled to the judgment of the Court, irrespective of any other considerations applicable to the case on the pleadings of the parties and also on the evidence.

II.

It is also insisted that the defendant, Geneseo Bank, is estopped because of its continued silence after the recording of the release in question, on November 27th, 1900. This estoppel is one *in pais,* if it exists. The answer to this proposition is:

First. Estoppel is not pleaded in the case by the plaintiff, Chicago Bank, in its reply.

Under our code system, where estoppel is relied upon, in order to defeat the title set up by the defendant in its answer, it should be pleaded in the reply.

Bliss on Code Pleading, 3rd Ed., Section 364.

But even if estoppel had been pleaded by plaintiff, Chicago Bank, in its reply, there is nothing in the evidence to sustain any such claim. There is nothing in the plaintiff's evidence, or, for that matter, in the record, to show that the defendant, Geneseo Bank, had any knowledge of said release until after it was brought out in this suit.

Was the defendant, Geneseo Bank, charged with constructive notice of the filing and recording of said release?

Wherever a system of public registration of deeds and conveyances exists, we understand the rule to be that the holder of a title is only charged with constructive notice of recorded deeds in the line of his title. The owner of property is not charged with notice of the recording of a deed which is not in the chain of his title.

In *Tydings* v. *Pitcher,* 82 Mo., 379, it was decided that the record of a deed lying outside of a purchaser's chain of title imparts no notice to him.

In the same case it was decided that a recital in a deed in the purchaser's chain of title, that the purchase

money therefor is unpaid, is notice to him of a vendor's lien, and puts him on inquiry as to the existence of every fact that the existence of the lien would imply or lead to, and such purchaser is put upon inquiry as to the fact that the lien may have been extinguished by an unrecorded deed conveying the premises back to the original owner.

That case decides that a conveyance or instrument lying outside of the chain of title of the owner is not, upon being recorded, constructive notice to him, but it also bears upon the question already discussed, of the attitude of the plaintiff in this case of being a subsequent, innocent, *bona fide* purchaser for value, without notice.

The latter point decided by the case, and the reasoning of the Court in support of it, show that it was the duty of the plaintiff Bank, or the Cattle Loan Company, to make inquiry as to where the note held by the defendant, Geneseo Bank, was held, in making the purchase of the renewal notes given in October, 1900.

The plaintiff, Chicago Bank, or what is the same thing, the Chicago Cattle Loan Company, was put upon inquiry when it made its purchase in October, 1900, as to where defendant Geneseo Bank's note was held. The defendant, Geneseo Bank's mortgage had been on record since July, 1900. It secured a negotiable promissory note. There is no pretense or claim that the plaintiff, Chicago Bank, or the Chicago Cattle Loan Company, made any demand on Siegel-Sanders Live Stock Commission Company, in October, 1900, for the production of the note held by the defendant Bank. If the plaintiff Bank, or the Cattle Loan Company had made demand in October, 1900, for the production of the defendant Bank's note, the plaintiff or the Cattle Loan Company would have learned that said note was out-

standing and was not held by the Siegel-Sanders Company. The fact that defendant, Geneseo Bank's note was payable at the office of the Siegel-Sanders Company did not excuse plaintiff Bank or the Cattle Loan Company from calling for its production.

Ward v. *Smith*, 7 Wall., 447.

In the case of *Sensenderfer* v. *Kemp*, 83 Mo., 582. it was decided that one is not charged with constructive notice of deeds on record when he does not claim by or through them. The defendant, Geneseo Bank, does not claim by or through the unauthorized release, given by the Siegel-Sanders Company. On the contrary, the defendant Bank claims adversely to that release.

So in the case of *Meier* v. *Meier*, 105 Mo., 412, 433, it was held that the record of a deed given by a mortgagor, after the execution of a prior mortgage, does not constitute notice to the prior mortgagee.

It results, therefore, that the defendant, Geneseo Bank, was not affected with constructive notice of the unauthorized release given and filed on November 27th, 1900, by Siegel-Sanders Company, nor was the defendant Bank affected with constructive notice of either of the renewal mortgages given in October, 1900, and April, 1901, to the Siegel-Sanders Company.

See also:

Ford v. *Church Society*, 120 Mo., 498, 510.

The learned author of Jones on Mortgages, Vol. 2, Sec. 1624, speaking of the rights of a mortgagee, states the rule as follws:

> "The record of a subsequent deed is not, how-
> "ever, notice to the prior mortgagee. He is not re-
> "quired to search the records from time to time to
> "see whether other incumbrances have been put up-
> "on it. A distinct and actual notice is necessary to
> "affect the rights of the mortgagee in this respect

"and oblige him to foreclose with reference to the "subsequent order of alienation. The record is not "even subsequent notice to him."

The general principle of construction of the registry laws upon the point of notice is, that the registration of deeds and incumbrances is notice to subsequent vendees and incumbrancers only. The filing for record of the unauthorized release and of the mortgage held by the Chicago Bank were therefore not notice to the Geneseo Bank which held under a prior recorded mortgage.

Ackerman v. *Hennicker*, 85 N. Y., 43, l. c., 50;
Gen. Stat. Kansas, 1899 (Dassler's), Sec. 4060-4062, p. 842;
Rowan v. *Mfg. Co.*, 29 Conn., 282, l. c., 325;
Schmidt v. *Zahrndt*, 148 Ind., 447, l. c., 451;
Tapia v. *Demartini*, 77 Cal., 383, l. c., 387;
Nelson v. *Boyce*, 7 J. J. Mar. (Ky.), 401, l. c., 404;
Ward v. *Cooke*, 17 N. J. Eq., 93, l. c., 99;
Shirras v. *Craig*, 7 Cranch, 34, l. c., 51;
Trust Co. v. *Iron Works*, 51 N. J. Eq., 605-607;
Summers v. *Roos*, 42 Miss., 749, l. c., 778;
Witczinski v. *Everman*, 51 Mass., 841;
George v. *Wood*, 9 Allen, 80, l. c., 83;
McDaniels v. *Calvin*, 16 Vt., 300, l. c., 306;
Seymour v. *Danon*, 31 Vt., 122, l. c., 134.

As the defendant, Geneseo Bank, had no actual notice of either the release in question or of the renewal mortgages given by Grimes in October, 1900, and in April, 1901, under which the plaintiff Bank claims, and as the defendant, Geneseo Bank, was and is not affected with constructive notice of either of those mortgages or of said release, it results that the claim of estoppel wholly fails, and could not be considered as sustained, even if it had been pleaded by plaintiff, Chicago Bank, in its reply.

III.

But independently of each and both of the foregoing considerations, we submit that the law of this case is with the defendant, Geneseo Bank.

This is a case of a Kansas mortgage. The cattle, at the time of the several mortgages involved in this case, and the residence of the mortgagor, Grimes, were all in Clark County, Kansas. The statute of Kansas applicable to this case is made a part of the record in this case for the consideration of this Court, by stipulation of the parties, without reference as to whether said statute is pleaded by either party.

The statute of Kansas applicable to mortgages of personal property, in the years 1900 and 1901, when these mortgages were given, may be found in Dassler's General Statutes of Kansas for the year 1899, from page 842 to 845, and from Sections 4060 to 4078. We do not deem it necessary to copy in this brief, or in an appendix thereto, the whole of the Kansas statutes relating to Kansas mortgages of personal property. As our statement shows, the said three mortgages were severally made and recorded conformably to those statutes.

It will not be denied that there is no provision in said chapter in relation to mortgages of personal property in Kansas requiring the assignee of a mortgage to obtain a written assignment of the same and to file the same with the register of deeds of the county. There is no such provision requiring either the making or the recording of such assignment of a chattel mortgage in the Kansas statutes.

In the same volume of the Kansas statutes, stated above, from page 837 to page 842 of the same, may be found the chapter of the Kansas statutes in relation to mortgages of real property, and an examination of that

chapter will show that the Kansas legislature made specific provisions, full and in detail, requiring assignments of real estate mortgages to be made and recorded, but, as before stated, although the Kansas legislature made full and specific provisions for the making and recording of assignments of real estate mortgages, no corresponding provision is to be found in the next succeeding chapter in relation to mortgages of personal property. If at this point we apply to these two chapters the maxim *"Expressio unius est exclusio alterius,"* it follows that the Kansas legislature intended, in regard to mortgages of personal property, that the free transfer of such mortgages should be unfettered by the making and recording of assignments in analogy to the common law requiring no record of personal property transfers.

It also follows that there was no law which permitted the defendant, Geneseo Bank, at the time in July, 1900, when it bought its note and mortgage, to obtain and file of record an assignment of its note and mortgage. The statutes in regard to mortgages being silent on the subject, the assignment of the mortgage to the defendant, Geneseo Bank, became complete upon the sale endorsement, and delivery of the note secured by the mortgage given to Siegel-Sanders Live Stock Commission Company to the defendant Bank. Of course, the Bank could not file or record with the register of deeds its note or the endorsement on the back of it. There never was a law requiring or permitting such a thing to be done. But the mortgage purchased in July, 1900, by the defendant Bank, secured a negotiable promissory note, and when the Bank became the purchaser and owner of that note it thereby, and without more, became the assignee of the mortgage, and all persons dealing with the mortgaged cattle thereafter were affected with notice that defendant Bank's mortgage, which was given for the benefit equally of the mortgagee or his assignee,

might be held by an assignee instead of being held by the original mortgagee. After the assignment all the rights and powers of the original mortgagee vested in and devolved upon the defendant Bank by virtue of its purchase of the note and its title as assignee acquired thereby.

Defendant Geneseo Bank's mortgage (p. 27 record), in several places contains the provisions, "Said second party, its successors and assigns, and in the clause of the mortgage giving the right of foreclosure at the maturity of the debt, or in case of a removal or attempt to remove, the mortgaged property, the mortgage provides that, "Then and thenceforth it shall be lawful for the said party of the second part, *its successors or assigns*, or its authorized agent, to enter upon the premises of said party of the first part, or any other place or places wherein said goods and chattels or live stock may be, to remove and dispose of the same as aforesaid, without resort to law," and then follows a provision authorizing either public or private sale of the mortgaged property by the mortgagee, or in case of an assignment, by the assignee. The mortgage of the defendant Bank is the same in the above respects as chattel mortgages generally.

The subject of satisfaction of chattel mortgages in Kansas in force in 1900 and 1901, is provided for in Section 4076 of said Dassler's Kansas Statutes for 1899, and is as follows:

> "4067. Satisfaction. When any mortgage of personal property shall have been fully paid or satisfied, it shall be the duty of the mortgagee, *his assignee* or personal representative, to enter satisfaction or cause satisfaction thereof to be entered of record in the same manner as near as may be, and under the same penalty for neglect or refusal as provided in case of the satisfaction of mortgages of

real estate. The entry of satisfaction shall be made in the book in which the mortgage is entered, as hereinbefore provided; and any instrument acknowledging satisfaction shall not be recorded at length, but shall be referred to under the head of 'Remarks,' and filed with the mortgage or copy thereof, and preserved therewith in the office of the register."

The subject of obtaining possession of mortgaged personal property in Kansas, by either the mortgagee or his assignee, is provided for in Sections 4068 and 4069 of said Dassler's Statutes, which read as follows:

"4068. Sell Property. After condition broken, the mortgagee *or his assignee* may proceed to sell the mortgaged property, or so much thereof as may be necessary to satisfy the mortgage and costs of sale, having first given notice of the time and place of sale by written or printed hand-bills posted up in at least four public places in the township or city in which the property is to be sold, at least ten days previous the sale."

"4069. Demand Sale. If the mortgagee *or his assignee* shall have obtained possession of the mortgaged property, either before or after condition broken, the mortgagor or any subsequent mortgagee, may demand in writing a sale of such property. In such case the mortgagee shall proceed to sell the property, having first given the same notice as is provided in the preceding section."

These three sections in regard to the satisfaction of a chattel mortgage and a sale by the mortgagee or his assignee, each and all conclusively show that where there is an assignee of a chattel mortgage he stands in the place of the original mortgagee, and since the Kansas statutes, in regard to chattel mortgages, contain no provision for the making or filing of a separate or formal assignment, it results that the word "assignee" in said sections applies to a case like the one at bar, where the

mortgage is assigned by the mere endorsement, transfer and delivery of the note secured by the mortgage.

The proposition on this branch of the case, contended for by the defendant, Geneseo Bank, was decided by the Supreme Court of Kansas in *Burnhans* v. *Hutcheson*, 25 Kansas, 625. That case clearly recognizes the distinction between mortgages securing negotiable promissory notes and mortgages securing non-negotiable promissory notes, and it was held in that case that although at the time of its decision, and at the time of the transaction therein considered, there was a statute in Kansas regarding the assignment of real estate mortgages, such statute did not apply to mortgages securing negotiable promissory notes, and it was further held that where a mortgage on real estate is given to secure a negotiable promissory note, and before the maturity of the note, the note and mortgage are transferred by endorsement and delivery of the note to a purchaser, the mortgagor, although having no notice whatever of such assignment and transfer, cannot thereafter pay off said mortgage to the mortgagee so as to defeat the real owner and holder thereafter from recovering. In the opinion in that case there is a full consideration of this subject, and, among other cases, the case of *Carpenter* v. *Longan*, 16 Wall., 271, is approved by the Kansas Supreme Court.

The Court, in its opinion in *Burhans* v. *Hutcheson*, says, in speaking of the provision of the real estate mortgage statute, respecting the assignment of real estate mortgages, as follows:

> "Section three speaks of the recording of the assignment of the mortgage and does not by its terms refer to negotiable paper, and it seems to us a strange interpretation to hold this provision applicable when the debt is evidenced by a negotiable note secured by a mortgage upon real estate, when said mortgage is merely ancillary thereto and fol-

lows the note wherever it goes, deriving its character from such instrument."

In that case the mortgagor had made a conveyance of land to the mortgagee in satisfaction of the mortgage debt, after the mortgagee had transferred the note and mortgage, and it was held that the transfer of the real estate to the mortgagee did not extinguish the mortgage held by the plaintiff, and the Court in this connection says:

> "Nor was it necessary for the plaintiff to record the assignment of the mortgage to protect himself from payment to the mortgagee. The notes and mortgage went together, and the mortgagor having made the conveyance and payment without a surrender of the notes and mortgage, did so at his peril."

This subject again received consideration and was determined by the Kansas Supreme Court in the year 1897, in the case of *Insurance Co.* v. *Huntington,* 57 Kansas, 744. In that case it was adjudged that the assignment and delivery of a negotiable promissory note, before maturity, operates as an assignment of the mortgage given as security for the payment of the note, and that after such transfer the original mortgagee has no power to release or discharge the lien of the mortgage, and that a release made by him, without authority, will not affect the rights of the assignee.

It was further adjudged in that case that an assignee of a duly recorded mortgage is authorized to discharge the same by an entry upon the margin of the record acknowledging satisfaction of the mortgage, signed by himself in the presence of the register or his deputy, who shall subscribe the same as a witness, and that when an entry is so made, subsequent mortgagees must take notice thereof.

In that case one Hill executed and delivered a negotiable promissory note to one Gunn and others, and at the same time executed a mortgage upon 64 lots in the city of Fort Scott to secure said note. There was a stipulation in the mortgage that for every $75.00 paid a lot should be released. After the execution of the mortgage the note was transferred to Huntington and payment thereon guaranteed by the payees. Subsequently a number of the lots included in the mortgage were sold by Hill, the mortgagor, and upon payments made Huntington, the assignee of the note, released and discharged of record the lots so sold. These releases were made on the margin of the record of the mortgage in the register of deed's office. Afterwards the payee of the note entered a release and discharged the mortgage upon two of the lots, and thereafter, one Bye, who had become the owner of said two lots, mortgaged said two lots so released by the mortgagee to the Mutual Benefit Life Insurance Company, and made a second mortgage to the Matthewson Company, and with the proceeds of these two mortgage loans, Bye, the purchaser from the original mortgagor, Hill, erected two dwelling houses on the two lots in question. Afterwards, Huntington, who as we have seen, was the assignee of the note before the entry of satisfaction by the mortgagee of those two lots, instituted a foreclosure proceeding against the two lots, and the Insurance Company, as mortgagee of Bye, and Angell, Matthewson & Company, the second mortgagee, set up their mortgages claiming that they were superior to the mortgage of Huntington. This state of facts presented, as will thus be seen, the same identical question arising in this case. The Trial Court in that case gave a judgment in favor of Huntington, the assignee, and found that the release executed by the payees of the note, after they had transferred it and the mortgage to Huntington, was null and void, and did not operate to dis-

charge the lots from the lien of the Huntington mortgage, and a decree was entered declaring the foreclosure judgment on the mortgage of Huntington to be a first and superior lien upon the lots in question, without regard to the improvements thereon.

The Supreme Court of Kansas, in affirming the decree of the Trial Court in that case, used the following language:

"The note was negotiable; and it is well set-
"tled that, where such a note is secured by a mort-
"gage, the note is the principal and the mortgage is
"the incident, and that an assignment of the note is
"an assignment of the mortgage. No obligation
"rested upon Huntington to record his assignment
"in order to protect himself against the subsequent
"mortgagee. As the mortgage was given to secure
"a negotiable note, it could be assigned by the mere
"endorsement or delivery of the note, and there
"was in fact no assignment to record. It has been
"expressly held that the *bona fide* holder of negoti-
"able paper, transferred to him by endorsement
"thereon before maturity and secured by a real estate
"mortgage, need not record the assignment of the
"mortgage. *Burhans* v. *Hutcheson*, 25 Kan., 625.

"After assigning the note and mortgage, the
"mortgagees had no interest therein, and no power
"to release or discharge the lien of the mortgage;
"and, being wholly without authority, the release
"executed by them cannot affect the rights of the
"assignee. When the plaintiffs in error found upon
"the record a mortgage securing a negotiable note,
"it was their duty to inquire whether the release was
"executed before or after the assignment and by
"persons having authority to do so. 1 Jones Mort-
"gages, Sec. 814.

"The statute recognizes the assignee as a proper
"party to release or discharge a mortgage lien, and
"provides that this may be done by an entry on the
"margin of the record, signed by him in the pres-
"ence of the register of deeds or his deputy, who

"shall subscribe the same as a witness. Sec. 3889, "Gen. Stat. 1889."

As we have already seen, the statute in regard to mortgages of personal property in Kansas did not permit such a thing as the making and filing of the assignment of a chattel mortgage, and that this idea has been acted upon by the people of Kansas is shown by the testimony in this case of the register of deeds of Clark County, Kansas, who testified that no assignment of a chattel mortgage had ever been filed in his office (pp. 69 and 70, Record).

As bearing on this same question, we also refer to the case of *Bronson* v. *Ashlock*, 2 Kansas Appeals Rep., 255, 259.

The case of *Carpenter* v. *Longan*, 16 Wall., 271, which was decided in 1872 by this court, and which is approved by the Supreme Court of Kansas in the 25th Kansas report already cited, is a leading case on this subject.

In that case it was adjudged that where a mortgage given at the same time with the execution of a negotiable note and to secure payment of it, is subsequently, but before the maturity of the note, transferred to a *bona fide* purchaser for value, without notice, the holder of the note, when obliged to resort to the mortgage, is unaffected by any equities arising between the mortgagor and mortgagee, subsequent to the transfer, or of which the assignee had no notice at the time it was made. He takes the mortgage as he did the note.

We invite the serious consideration to this case of *Carpenter* v. *Longan*, because it is authority in this Court, and is now recognized generally as containing a sound exposition of the law on this subject.

The case of *Swift* v. *Smith*, 102 U. S., 422, is also in point. In that case the release did not acknowledge the payment of the note, but simply purported to be a

release of the land and of the right, title and interest acquired by the trustee by virtue of the trust deed given in that case to secure the debt evidenced by a note which had been transferred to a third party, and it was held in that case that the transferee had the better title, and that his title, by virtue of the transfer of the mortgage and note, was unaffected by the subsequent release.

See also the remarks of the Supreme Court of the United States, in its opinion in the case of *Railway Company* v. *Merchant's Bank,* 136 U. S., 283.

So in Jones on Chattel Mortgages, Section 662 (a), that author says:

> "A release of record, made by a mortgagee "after he has assigned a negotiable note not due se- "cured by the mortgage, will not discharge it, as "against an assignee of such note which remains "unpaid."

The reason for the distinction made by the legislature in the statute of Kansas, in expressly providing for assignments of real estate mortgages, while industriously refraining from making any provision respecting assignments of mortgages of personal property, is discussed in Section 663, in Jones on Chattel Mortgages, as follows:

> "In many states it is provided that mortgages of personal property, which have been recorded or filed as provided by statute, shall, upon payment, be discharged or satisfied by a release or entry upon record, and penalties are imposed upon mortgagees who neglect or refuse to make such discharge. Such a provision for the discharge of mortgages of real estate is to be found upon the statute books of almost every state and territory; but in only a part of the states is there such an enactment in relation to chattel mortgages. This difference in legislative enactments in regard to the discharge of real estate mortgages and those relating to the discharge of mortgages of personal property arises from the

fundamental distinction between real and personal property. The title to real property can be transferred only by deed; and the policy of the recording acts requires that every deed of such property shall appear of record. But no deed in writing is necessary for the transfer of title to personal property. A purchaser takes the title of his vendor, and must rely upon his possession or upon his warranty. 'A mortgage duly recorded,' said Mr. Justice Hoar of Massachusetts, 'gives certain rights to the mortgagee, created and defined by the statute, but the statute does not change the nature of the property, nor require that all subsequent changes shall be shown upon the record. An assignment or release of the mortgage is not required to be recorded.'

"The states, therefore, which require the recording of a release or satisfaction of a chattel mortgage, do not make the requirement because the same necessity exists as in the case of mortgages of real property, but because there is a certain convenience in having the record made clear upon the payment of the debt."

In the case of *Biggerstaff* v. *Marston,* 161 Mass., p. 101, it was adjudged that if a mortgage and note secured thereby, given by A. to B., are assigned by B. to C., before maturity, and A., in ignorance of such assignment, makes payment on account of the principal and interest to B., who is not the financial agent of C., and B. does not and is not asked to produce the note and indorse the payments thereon, but gives receipts therefor. A., in making those payments, acts at his own peril, and not having paid to the owner or owner's agent, must be held to have acted in his own wrong.

It was also adjudged in that case that it is not the duty of a purchaser of a note and mortgage secured thereby to notify the mortgagor of his purchase, but it is the duty of the mortgagor, if he proposes to pay the debt before maturity, to require the actual production of

the note, when making such payment to the original mortgagee.

See also:

Watson v. *Wyman,* 161 Mass., 96;
Mulcahy v. *Fenwick,* 161 Mass., 164.

In that case it was likewise adjudged that negligence is not imputable to the assignee of a mortgage because he does not notify the mortgagor that he has taken an assignment, or because he does not demand payment at the maturity of the mortgage.

See also:

Hefferman v. *Boteler,* 87 Mo. App., 316;
Brooke v. *Struthers,* 68 N. W. Rep., 272.

The case of *Lee* v. *Clark,* 89 Mo., p. 553, is precisely in point in this case. There it was adjudged that the payee of a note, secured by a deed of trust, after he has assigned the note before maturity, cannot, by entering satisfaction of the debt on the margin of the record, or in any other manner, release the property from the lien, as between a *bona fide* purchaser and the assignee of the note.

See also:

Hagerman v. *Sutton,* 91 Mo., 519-532.

A very recent case, which is also decisive of the question in controversy in this cae, is the case of *Swift* v. *Bank of Washington,* 104 Fed. Rep., 643. That was a decision by the United States Circuit Court of Appeals for the 8th Circuit, and the case was decided in March, 1902. The opinion was delivered by Judge Caldwell. The cases of *Carpenter* v. *Longan,* 16 Wall., 271, and *Burhans* v. *Hutcheson,* 25 Kansas, 625, were cited and followed.

That case, like the case at bar, arose in the state of Kansas. It was adjudged that the assignment of a note,

before maturity, to a *bona fide* holder, carried with it a chattel mortgage executed as security therefor, and that the assignee alone could thereafter discharge the mortgage lien, and that payment of the indebtedness to the original mortgagee, by a purchaser of the mortgaged property, after the assignment of the note, was insufficient, although the purchaser had no notice of the assignment.

It was further decided in that case that a provision in a chattel mortgage that when the mortgaged property was ready for market it was to be consigned to the mortgagee and the proceeds applied to the mortgage debt, did not authorize payment to the mortgagee, after the not had been assigned to someone else.

In the mortgage in that case was a provision which recited that the mortgage was intended as security for the mortgagee as long as he was, "In any manner in-"terested in the payment of the indebtedness, either as "payee, indorser, guarantor or otherwise, as well as for "the security of the assignee or indorsee, and such trans-"fer or assignment shall not carry with it the sole right "to enforce the mortgage, but the same shall be vested "severally in the second party (mortgagee) concurrently "with such transferee or assignee," and it was held by the court in that case that that clause in the mortgage did not authorize payment to the mortgagee, after the note had been assigned to someone else.

Notwithstanding said last quoted provision in the mortgage under consideration in said case of Bank of Washington, the court there decided the case in favor of the assignee, who occupies the same position in that case as the defendant, Geneseo Bank, in this case.

In *Cummings* v. *Hurd,* 49 Mo. App., 139, it is said:

> "It is a well settled general rule that if a debtor owing money on a written security pays to or set-

tles with another as agent, it is his duty at his peril to see that the person thus paid, or settled with, is in possession of the security. If not thus in possession the debtor must show that the person to whom he pays or to whom he settles has special authority or has been represented by the creditor to have such authority."

See also *Walter* v. *Logan,* 63 Kansas, 193, which was decided by the Kansas Supreme Court in 1901.

The law on this whole subject is summarized in the following terse statement in the chapter on mortgages in Vol. 20 of the American & English Encyclopedia of Law (2nd Ed.), at pages 1045 and 1046.

"Effect of Release or Discharge of Mortgagee. "A mortgagee of land cannot rightfully release or "discharge the mortgage after an assignment there- "of unless authorized by the assignee, and therefore "his release or discharge will not affect the rights of "the assignee where the mortgagor or his grantee "had actual or constructive notice of the assign- "ment, or where the mortgage was given to secure "a negotiable note. But if the recording acts afford "the assignee the opportunity of giving notice of "his rights by procuring and putting on record a "written assignment of the mortgage, a neglect on "his part to do so will estop him from asserting the "invalidity of a duly recorded release or discharge "executed by the mortgagee, as against an innocent "purchaser who has paid his money for the prop- "erty without notice of the assignment and on the "faith of the public records."

This statement of the law was published in the second edition of this work in 1902, and in notes 6, 7 and 8 of the text thus quoted may be found a summary of some of the latest cases decided by the American Courts on this question.

In addition to the foregoing case we beg leave also to cite the following:

Robinson v. *Campbell,* 60 Kansas, p. 60.

And in the case of *Bohart* v. *Bockham,* 62 Kansas, 658, it was held by the Kansas Supreme Court, in 1901, that a mortgagee in a chattel mortgage, after assigning the note, together with the chattel mortgage to secure it, had no right or power left under the mortgage to sue in an action of replevin for the mortgaged property; that the holder and owner of the note as the real party in interest was the only party who could maintain an action of trover or replevin for the mortgaged cattle.

In this case there is not a fact or circumstance which did or could make Siegel-Sanders Live Stock Commission Company the agent, for any purpose, of defendant, Geneseo Bank, but even if it could be conceded, for the sake of argument, though not as a fact, that the Siegel-Sanders Live Stock Commission Company, for some undefined purpose, was the agent of the defendant, Geneseo Bank, still the plaintiff, Chicago Bank, is confronted with the proposition of law that a third person claiming under the act of an agent performed by him under an authority subject to limitation is bound to take notice of the limitation and the extent of such authority and the conditions requisite for its exercise.

Mechem on Agency, Secs. 273, 276 and 291.

The Siegel-Sanders Live Stock Commission Company, if they had authority to release the mortgage of the defendant, Geneseo Bank, only possessed that authority up to the time of the transfer and sale of the note and mortgage to the said defendant, Geneseo Bank, and the plaintiff, Chicago Bank, and the Chicago Cattle Loan Company were bound to take notice that after Siegel-Sanders Live Stock Commission Company had parted with its title to said note, said Siegel-Sanders Live Stock

Commission Company no longer had authority to make the release in question, and if the plaintiff, Chicago Bank, or Cattle Loan Company, had made inquiry of the Siegel-Sanders Live Stock Commission Company and demanded the production of the note at the time of its renewal by the giving of the new note and mortgage in October, 1900, the plaintiff, Chicago Bank, or Cattle Loan Company, would have ascertained, beyond question, that the Siegel-Sanders Live Stock Commission Company did not have the note so as to be empowered to make the release.

It certainly is not required at this day to cite to the court authorities sustaining the proposition that a purchaser is bound to take notice of every fact which he could ascertain by means of inquiry. He is held in law to have notice of all such facts which he could ascertain upon inquiry, the same as if he actually knew them.

In *DeLaurel* v. *Kemper,* 9 Mo. App., page 77, it was adjudged that an entry of satisfaction of a deed of trust on the margin of the record thereof, by one claiming to be the assignee of the notes secured thereby, but who, in fact, is a stranger thereto and not in possession thereof, is void.

See also to the same effect:

Lakeman v. *Robard,* 9 Mo. App., page 179.

In the case of *Savings Bank* v. *Buck,* 71 Vermont, 190, where a purchaser of property which had been mortgaged to secure a note transferred by the mortgagee to a third party, made no further inquiry, but relied upon the recorded discharge, it was held that such purchaser could not defend against the foreclosure of the first mortgage, because he was charged with notice of the fact, which he could have learned upon inquiry, that the first mortgage was outstanding and had never been finally discharged.

In the case of *Parker* v. *Randolph*, 5 S. D., page 549, it was adjudged that the transfer of a note secured by a mortgage carries with it the mortgage also, and that where the original mortgagee and payee sold said note without an assignment of said mortgage to the purchaser of the same, and then takes a subsequent mortgage upon the same property and fraudulently discharges the prior mortgage, he can gain no advantage thereby, either for himself or for one for whom he is acting as agent in any transaction directly involving the property mortgaged.

The case of *Williams & Company* v. *Paysinger*, 15 South Carolina Reports, page 171, which was decided in 1880, is in some respects much like the case at bar. In that case, as appears from the head-note of the case, land was mortgaged by A. to B. for the purchase money. B. assigned his notes and mortgages to C., and C. assigned to D. This mortgage is duly recorded, but not the assignments. In that state an assignment of a mortgage is not required by law to be recorded. Afterwards A., not knowing of the assignment to D., gave new notes of the same amounts and payable at the same time, and a new mortgage to C., in satisfaction of the original notes and mortgage, which were not surrendered, C. saying that they were out at his home. Failing to pay the first note to C. at maturity, A. gave up possession of the land to C., and C. afterwards mortgaged it to other parties. The land having sold for enough to pay the first mortgage only, it was held that D. was entitled to the entire proceeds of sale. In the opinion in that case the court used the following language:

> "When Paysinger, for a valuable considera-
> "tion, assigned to Wheeler the first notes and mort-
> "gage of Sanders, he transferred the title and placed
> "it beyond his control. He could not afterwards
> "receive payment of the notes or enter satisfaction

"of the mortgage. An entry of satisfaction by a "mortgagee, after he has parted with his right in "the security, will not discharge the mortgage in "favor of one who has acquired an interest in the "land before the discharge was made. 2 Jones on "Mortgages, 157; Hill on Mortgages, 517; *Much-"ler* v. *Wadlington*, 5, s. c., 346; *Lynch* v. *Han-"cock*, 14 s. c., 66.

"But it is said that Sanders had no notice of the "assignment to Wheeler; that, at least, he was an "innocent party, who had the right to deal with "Paysinger, as the owner of the mortgage, and that "he must be protected. If it is meant by this that "in order to protect the rights of Sanders the second "notes and mortgages must stand as against Wheel-"er, it is difficult to understand how this transaction "can be good as to Sanders, while it is bad as to "Paysinger. Notice to the mortgagor of the assign-"ment is not necessary to its validity. There is no "law requiring the assignment of a mortgage to be "recorded, and if it had been put on record it would "not have amounted to constructive notice. The "doctrine of constructive notice by recording is not "to be extended to all papers which are, in fact, "recorded, but only to those which are authorized or "required to be recorded. 1 Story Equity Jurispru-"dence, 404; *Harper* v. *Barsh*, 10 Richardson "Equity, 149.

"Although there is no proof that Sanders had "actual notice, we do not consider him without "fault in the matter. The circumstances were "enough to put him on inquiry. The first mortgage "had been given by Sanders to Stevens, who had "assigned to Paysinger, and he to Wheeler. "Neither the notes nor the mortgage were before "the parties at the time of the execution of the new "notes and mortgage. Sanders knew that it was "an unusual proceeding to replace old notes se-"cured by a mortgage by others for precisely the "same amounts, and another mortgage by the same "party on the same tract of land, and that should

"have suggested inquiry as to the purposes. As "was said in the case of *Lynch* v. *Hancock, su-* "*pra,* 'common prudence would have suggested the "propriety of an inquiry as to whether all the bonds "had been paid or the lien securing the payment "properly released.' Sanders executed the new "notes and mortgage in place of the old ones with- "out taking up the latter or indeed seeing them. "The referee states that Paysinger said, 'that they "were at his house,' which seemed to satisfy San- "ders. It seems to us he was too easily satisfied. "Upon making a payment upon a mortgage, a "debtor should always require the production of "the note or bond secured by it. Otherwise it may "turn out that the evidence of the debt has been as- "signed. 2 Johnson on Mortgages, Section 956. "Where a recorded mortgage is discharged by a "person other than the mortgagee, the person pay- "ing the money, and a subsequent purchaser as well, "are bound to inquire what authority he had to "discharge it, and are charged with notice of such "facts as by proper inquiry might have been ascer- "tained. 2 Jones on Mortgages, 959; *Swartout* v. "*Cuett,* 5 N. Y., 30."

In the case of *Black* v. *Reno,* 59 Fed. Rep., page 917, it was held by the United States Circuit Court for the Eastern District of Missouri that where a negotiable note secured by a mortgage, duly recorded, is transferred for value before maturity to a third person, a subsequent acknowledgment of satisfaction by the mortgagee of the debt secured, does not impair the lien of the mortgage, unless it was made with the knowledge or consent of the holder of the notes, and hence the purchaser of the mortgaged land is not protected by such release, though he purchases on the faith of it.

See also *Brewer* v. *Atkeison,* 121 Ala., 410, which was decided in 1898.

Roberts v. *Halstead,* 9 Pa. St., 32;
Anderson v. *Kreidler,* 52 Neb., 171.

In the case of *Kehone* v. *Smith*, 97 Ill., 156, it appeared that a negotable note secured by a mortgage was assigned before maturity. Subsequent to the recording of the mortgage and the indorsement and delivery of the note, and before the maturity of the note, the mortgagor procured a loan from a third person and gave a second mortgage upon the same premises with the understanding that a portion of the money obtained from the second mortgage should be applied in satisfaction of the first mortgage. The mortgagor did pay the amount of the first mortgage debt out of the money received from the second mortgagee to the payee of the first mortgage note, who thereupon released the first mortgage. Upon a foreclosure bill filed by the assignee and holder of the first mortgage note, it was held that it not appearing that the payee to whom the loan had been paid was authorized to receive it in behalf of the assignee or had paid it over to him, the second incumbrancer held subject to the lien of the first mortgage.

It was also held by the Supreme Court of Illinois in that case that the second mortgagee, having notice of the prior mortgage, was put upon inquiry as to whether or not it had been assigned. Being so put upon inquiry, he was chargeable with notice of the rights of the assignee.

So in the case of *Stiger* v. *Bent*, 111 Ill., 329, it was adjudged by the Illinois Supreme Court that an entry of satisfaction of a deed of trust, by the trustee, when the indebtedness secured by it has not been paid, and the act is not authorized by the holder of the indebtedness, will have no effect upon the deed of trust, as between the original parties, or as to subsequent purchasers with notice, and it was also held that where a trustee enters satisfaction of a trust deed, duly recorded, in consequence

of a negotiation for the purchase of the land and for the purpose of consummating the sale, and accepts payment of the amount of the debt secured from such purchaser without obtaining and canceling the note, and without authority from the holder thereof, the purchaser cannot be said to have purchased without notice of the rights of the holder of the note.

See also *Preston* v. *Morris,* 42 Iowa, 549.

Martindale v. *Birch,* 57 Iowa, 291, was like the case at bar. It was a case of a chattel mortgage which had been executed to one King on a printing press to secure ten notes for the sum of $80.00 each. The defendant in the case purchased the printing press from the mortgagors. One of the notes had been endorsed and transferred by the mortgagee, King, to the plaintiff. The purchaser of the property, on inquiry of the mortgagor, was assured that there were no notes outstanding unpaid. The purchaser had no actual knowledge that the note in suit was owned by the plaintiff or that it was in existence. The mortgage at the time of the purchase was on record but was not released. Afterwards, the purchaser procured a written release of the mortgage. The Supreme Court of Iowa, in its opinion, uses the following language:

> "When King indorsed the note in suit to plain-
> "tiff the effect thereof was to transfer the lien of
> "the mortgage *pro tanto,* and no assignment of the
> "mortgage was necessary. That an assignment or
> "transfer of a note secured by a mortgage, operates
> "as an assignment of the lien, is a settled rule of the
> "law. This transfer of the lien was not in any man-
> "ner affected by a mistake in the date of the note.
> "Birch (the purchaser), was not in the least in-
> "jured, deceived or misled by the mistake. He was
> "charged, by the record of the mortgage, with the
> "correct amount of the note and the time of its
> "maturity. Was his release, upon the information

"which he received from the mortgagee and Siegler, "sufficient to protect him from the establishment of "this note as a lien upon the property? It appears "to us clearly that it was not. That the purchaser of "mortgaged property may safely rely upon state- "ments of the mortgagor that the debt had been "paid is a proposition that no one would contend for. "The possession of the mortgage by Siegler was a "circumstance tending to mislead him, but this was "clearly insufficient. The mortgage secured the "payment of 22 notes in all, and the notes having "been transferred to different persons, one only "could have possession of the mortgage. The mort- "gage recites that payment of the notes shall be "made to King, or his assigns, etc., and the defend- "ant was charged with notice of such assignments "as had been made."

So in *Tandercosk* v. *Baker,* 48 Iowa, 199, it was held that the transfer of a promissory note carries with it a mortgage executed to secure it and the mortgagee, after the transfer of the note, has no such control over the security that he can discharge or impair it to the prejudice of the transferee.

It was also held in that case that the assignee of a promissory note is not chargeable with the fraud of the mortgagee in procuring the registration of a mortgage executed to secure it. This case was, like the case at bar, a contest between the assignee of the mortgage note and a subsequent purchaser from the mortgagor, after the unauthorized release was made.

See also *Gordon* v. *Mulhore,* 13 Wis., 22.

We desire, in addition to the foregoing authorities, to refer the court to the case of *Demuth* v. *Bank of Baltimore,* 85 Maryland, 315. This case is also similar to the case at bar, and we invite the consideration of that case specially by the court in passing on this case.

So in the case of *Lapping* v. *Duffy*, 47 Ind., 51, it was adjudged that a mortgagee, who has a note secured by a mortgage, cannot by his entry of satisfaction of the mortgage upon the mortgage record affect the rights of the assignee of a judgment on the note and for a foreclosure of the mortgage. Incumbrancers, whose liens were created after such entry, will not be protected as purchasers for value without notice of such prior lien.

Afterwards, in 1877, the Indiana legislature passed a law providing the recording of assignments of mortgages. Subsequently there came up to be heard in the Indiana Supreme Court the case of *Dixon* v. *Hinter*, 57 Ind., 278; but, as the facts in said last case of *Dixon* v. *Hinter* arose prior to the said Act of 1877, providing for the recording of assignments of mortgages, the Supreme Court of Indiana, in said case of *Dixon* v. *Hinter*, followed the rule decided in the previous case of *Lapping* v. *Duffy*, 47 Ind., 51. The Court, as in most of the other cases, recognized a clear distinction between the rule which exists in jurisdictions where there is no statute requiring assignments of mortgages to be recorded, and the rule which exists in states where there is such a statute.

So, again, the Indiana Supreme Court, in the case of *Reeves* v. *Hayes*, 95 Ind., 521, adjudged that prior to said statute of 1877, providing for the recording of assignments of mortgages, there was no law authorizing the record of an assignment of a mortgage, and that such record, if made prior to that statute, would not have been notice to subsequent purchasers or mortgagees in good faith.

It was also adjudged in that case that, after assigning the debt secured by a mortgage, the mortgagee has no power to enter satisfaction of a mortgage, and such

entry of satisfaction by him on the margin of the record will not give priority to a subsequent mortgagee in good faith without actual notice of the assignment of the debt.

There is a very full consideration, in the opinion of the Court, in this case, and many cases cited. Among the cases cited is the case of *Burhans* v. *Hutcheson,* 25 Kansas, 625.

To sum up the whole matter in a few words, it seems to us too plain to require the further citation of authorities, that since there has never been any statute in Kansas requiring or permitting the recording in the office of the register of deeds of the assignment of a chattel mortgage, the title of the defendant, Geneseo Bank, in this case must be held to be the better title, and must prevail over the title of the plaintiff, Chicago Bank.

IV.

We insist on the point that this case, like all other cases, must be tried on the pleadings. The defense of the Chicago Bank to the note and mortgage of the Geneseo Bank, as disclosed by the reply of the Chicago Bank, was simply and solely that the note of the Geneseo Bank was held by the Sieger-Sanders Company at the time that company gave the release relied upon. Of course, if that averment was true, that was in itself a complete and sufficient answer to the contention of the Geneseo Bank. A release may always be given by the party who holds and owns the note. But there were no averments in the reply of the Chicago Bank which met the case of the Geneseo Bank upon the fact disclosed by its answer and by the evidence that the Geneseo Bank owned its note and mortgage long prior to the giving by the Siegel Company of its release. There was nothing, we repeat, in the reply of the Chicago Bank to meet that

case. In order to meet that case the reply of the Chicago Bank should have shown by distinct, positive and affirmative averments that the Chicago Bank paid full value in cash for its note and mortgage. There is no averment in the reply of the Chicago Bank to notify either the Court or the opposing counsel that the Chicago Bank relied upon the plea of an innocent purchaser for value, without notice. Its sole defense, as disclosed by its reply, was that the Siegel Company, which gave the release, owned the note and mortgage at the time of giving the release, and therefor had authority to give the release. We insist that upon the pleadings alone the Geneseo Bank is entitled to the judgment of the Court. This contention is especially applicable to this case, because the Chicago Bank was the plaintiff below. The title of the Geneseo Bank was fully disclosed in its answer. The plaintiff came back and sought to meet the case made by the Geneseo Bank in its answer by a special reply. We suggest that the plaintiff is bound by this reply. Furthermore, the reply of the Chicago Bank discloses how the note and mortgage held by the Geneseo Bank was paid. The reply says that the Geneseo Bank's note and mortgage was paid by a renewal given, not to the Geneseo Bank, but the reply says it was given to the Siegel Company. The averment in the reply that the Geneseo Bank's note and mortgage was paid by that renewal taken in connection with the agreement and confession of the Chicago Bank at the trial, that the Geneseo Bank held its note and mortgage from a short time after it was given is a confession that the Chicago Bank is not an innocent purchaser. The Chicago Bank cannot be an innocent purchaser on the statement made by it in its reply that the negotiable note held by the Geneseo Bank was paid by the giving of a renewal note to another party. The renewal note which the Chicago Bank confesses in its reply was given in October, 1900, can not extinguish the

negotiable note in renewal of which it was given if it was not held by the party to whom the renewal note was given. The Cattle Loan Company and the Chicago Bank knew that as well as they know anything. The Cattle Loan Company and the Chicago Bank ought not to have accepted the note and mortgage given in October, 1900, as a renewal of the old note and mortgage held by the Geneseo Bank without at least making some inquiry of the Siegel Company where that note was. Nothing is better settled than that a negotiable promissory note cannot ordinarily be paid without the production of the note itself. Neither the Cattle Loan Company or the Chicago Bank had a right to rely upon the statements of the Siegel Company in this respect, no matter how positive or emphatic those statements may have been. On this branch of the case the Chicago Bank made open confession of our case and acknowledged that some inquiry should have been made at the time of the giving of the renewal note and mortgage in October, 1900, of the note and mortgage held by the Geneseo Bank. In the brief of the Chicago Bank on the first appeal, its counsel confess but do not avoid our case. Again, not only the note and mortgage given in October, 1900, was a renewal, but our statement shows the note and mortgage now held by the Chicago Bank was a renewal of the note and mortgage given in October, 1900. How is the note and mortgage in suit a renewal of the other one given in October, 1900, unless the Chicago Bank and the Cattle Loan Company be one and the same. There is no showing either in the evidence or in the argument of the counsel of the Chicago Bank that that bank ever paid the Cattle Loan Company a nickel for the note and mortgage given in October, 1900. The case shows that the Chicago Bank and the Cattle Loan Company are one and the same. Nor is there anything to show that the Chicago Bank paid the Siegel Company anything

at the time of the giving of the last renewal in April, 1901. It is true that the Chicago Bank in its brief on the first appeal, says that the Chicago Bank "actually advanced to the Siegel-Sanders Company the said sum of $15,389.54 in cash." There is not a particle of evidence in the case to warrant that statement. And the error of that statement is shown by what immediately follows in the brief in the same connection, as follows: "That amount less the discount being credited to the account of the said Commission Company." How the credit was given is not shown by the Chicago Bank, upon whom the burden of making out the case of an innocent purchaser rested. President Doud, in his testimony, "We credited their account (meaning the Siegel-Sanders Company) for the amount of the notes less discount." That answer implies that the Chicago Bank had a running account growing out of these mortgages with the Siegel-Sanders Company, and if, as was probable, the October, 1900, note and mortgage were, on their maturity, charged up by the Chicago Bank in the account that President Doud testifies to, against the Siegel-Sanders Company, then when the last renewal note and mortgage were given the credit that he speaks of was proper. But that credit was not a payment of anything to the Siegel-Sanders Company, but was simply a matter of bookkeeping. There is nothing to show in the testimony of Doud or anybody else that any sum was placed to the credit of the Siegel-Sanders Company subject to check or draft, when the renewal of April, 1901, was given, or that the Siegel-Sanders Company ever received a dollar. The Counsel of the Chicago Bank, at page 33 and page 34 of their brief on the first appeal, says: "The evidence is conclusive that the defendant in error at the time it purchased its notes and mortgage actually advanced to the Siegel Company in cash $15,389.54." We repeat that there is not a particle of evi-

dence in the case to warrant that statement. The case of the Chicago Bank stands, therefore, upon the purchase made in October, 1900, by the Cattle Loan Company of the notes and mortgage given at that time. And if the Cattle Loan Company was not, in October, 1900, a *bona fide* purchaser by purchasing in advance of the giving of the release relied upon, then the Chicago Bank is not a *bona fide* purchaser, because its case stands upon the purchase made and the cash paid by the Cattle Loan Company, in October, 1900.

In addition to the foregoing it should be borne in mind upon the proposition of the Chicago Bank that it is an innocent purchaser for value without notice, that by Section 4246, of the Chattel Mortgage Law of Kansas, Dassler's Statute of 1901, page 896, it was provided as follows:

> "Every mortgage so filed shall be void as against the creditors of the person making the same or against subsequent purchasers or mortgagees in good faith after the expiration of one year after the filing thereof, unless within 30 days next preceding the expiration of the term of one year from such filing, and each year thereafter the mortgagee, his agent or attorney, shall make an affidavit extending the interest of the mortgage at the time last aforesaid claimed by virtue of such mortgage, and if said mortgage is to secure the payment of money, the amount yet due and unpaid. Such affidavit shall be attached to and filed with the instrument or copy on file to which it relates."

This section of the Kansas chattel mortgage law has been in force for many years, and was in force both in 1900 and 1901, during which time the transactions in this case took place. That section of the Kansas chattel mortgage law has several times been construed by the Kansas Supreme Court, and it has always been held by that Court that any person taking a mortgage or buy-

ing personal property which has been mortgaged within a year makes his purchase subject to the right of the holder of the note under the mortgage to continue the lien thereof beyond the year by filing the affidavit prescribed by the statute during the last thirty days of the year. The theory of that section is that whether the chattel mortgage be given for 3, 6, 9, 12 or 18 months the holder of the chattel mortgage note has an unquestioned lien for one year from the time of the recording of his mortgage. This statute was construed in the case of *Howard* v. *National Bank*, 44 Kan., 549. It was there held that the words "subsequent purchasers" and "subsequent mortgagees in good faith," as used in that statute, meant only purchasers and mortgagees who purchased or took their mortgages after the expiration of one year from the filing of the mortgage. It was also held in that case that the taking of a second mortgage to secure the same debt secured by a first mortgage and upon the same property, does not operate as a satisfaction and release in lieu of the first mortgage. In the opinion of the Kansas Supreme Court in that case a citation is made from the case of *Meech* v. *Patchen*, 14 N. Y., 71, where the following language is used, in speaking of the duty of a subsequent mortgagee or purchaser:

> "Should he find a mortgage on file, he could not determine, without the help of the third section, whether the lien still continued, whatever length of time had elapsed since the filing; but by means of the provision in that section he could be certain that the mortgage had ceased to be a lien if he found that it had not been renewed within one year. *If his examination was made within the year, he must proceed at his peril, or take other means to ascertain whether the mortgage remained a lien.*"

When the plaintiffs in this case took their mortgage the defendant's mortgage was on file, and they according-

ly had the notice which the statutes contemplated. The year from the time when it was filed had not elapsed and no default or want of diligence had therefore happened on the part of the Geneseo Bank. If this suit had not been brought within eleven months from the time of the filing of the mortgage of record held by the Geneseo Bank and the Geneseo Bank had during the last thirty days of the year, in accordance with the above statute, filed its affidavit, there could be no question but what its title would have been continued beyond the year and that the Chicago Bank could not claim to be a subsequent mortgagee or purchaser for value in good faith. That this suit was brought before the expiration of the eleven months after the filing of the Geneseo Bank Mortgage, and that the filing of the affidavit by the Geneseo Bank was dispensed with by the bringing of this suit within the eleven months do not alter or affect the rights of the parties. The Geneseo Bank had, during the eleven months which preceded the time of the filing of the affidavit, substantially foreclosed its mortgage by taking into its possession the cattle in controversy, thereby dispensing with the necessity of filing the affidavit, and the case before the Court, therefore, is just the same as if the Geneseo Bank had filed the affidavit, and as if this suit had not been brought, and as if the Geneseo Bank had not attempted to foreclose its mortgage by taking possession of the property. And if the Chicago Bank could not claim to be a subsequent mortgagee or purchaser in good faith in the event that the Geneseo Bank had filed an affidavit, then it cannot claim to be a subsequent purchaser or mortgagee in good faith in this case, in view of the bringing of this suit and such attempted foreclosure. According to the doctrine of this case of *Howard* v. *National Bank,* the Chicago Bank and the Cattle Loan Company took their notes and mortgages within one year from the time of the filing of the mort-

gage of the Geneseo Bank at their peril, and it was their duty before taking their notes and mortgages within the year to make distinct inquiry as to whether the lien of the Geneseo Bank was still in full force, especially so, as they bought before the filing of the release. The Chicago Bank, as we have already seen in its other brief, confesses that it did not make inquiry, although it was their duty to do so. They confess that if they had made inquiry and had learned that the notes were held by the Geneseo Bank, they still would have taken the word of the Siegel-Sanders Company to satisfy it. As already seen they confess, but do not avoid our case.

The Kansas Supreme Court, in the case of *Farmers Bank* v. *Bank of Glen Elder*, 46 Kan., 376, reaffirm the holding in said case of *Howard* v. *National Bank*. In this last case Chief Justice Horton, who delivered the opinion of the Court, used this language:

> "He who purchases after the year has expired during which a mortgage remains in force has a right, in the absence of the ordinary affidavit, to suppose the mortgage has been paid, even though not released on the record, but he who purchases before the mortgage expires takes with notice of the mortgage and the rights of the mortgagee under the same. Therefore, the plaintiff having taken a second chattel mortgage soon after the filing of the first mortgage was not a subsequent mortgagee in good faith so as to have a prior lien to the first mortgage, although the first mortgage was not properly renewed within the year."

Nor does the fact that Inspector True examined the title in February, 1901, which was four months after the purchase by the Cattle Loan Company and the Chicago Bank of their paper, strengthen the case of the Chicago Bank. The proper time for examining the record title was before the purchase in October, 1900, when

the release would not have been found. Purchasers of cattle paper sometimes inspect the mortgaged cattle, after their purchase, but the title ordinarily is inspected before their purchase.

V.

The Chicago Bank, in its brief on the first appeal, at pages 34 and 35 thereof, confessed that the Geneseo Bank was not bound to take notice of the unauthorized release given by the Siegel-Sanders Company, and did not have constructive notice of that release nor of either of the renewal mortgages given to the Cattle Loan Company and the Chicago Bank. Since, therefore, the Geneseo Bank had no knowledge or notice of either the release given by the Siegel-Sanders Company, or of the subsequent renewal mortgages given in October, 1900, and April, 1901, to the Cattle Loan Company and Chicago Bank, it cannot be claimed that the Geneseo Bank was guilty of any negligence if it was not required, and under the Kansas chattel mortgage law had no power to take and file a formal assignment from the Siegel-Sanders Company of its note and mortgage when it purchased the same.

VI.

The brief of the Chicago Bank, on the two appeals, must be taken as practically confessing that in cases like the one at bar where there is no statute authorizing the making and recording of a formal assignment of a mortgage on the transfer of a mortgage negotiable promissory note, parties situated similarly to the Geneseo Bank in this case have the better title. The counsel of the Chicago Bank, recognizing the correctness of this proposition, seek to show that by the chattel mortgage laws

of Kansas the transferee of a negotiable promissory note secured by a chattel mortgage may take and record a formal assignment. The counsel of the Chicago Bank, although making this attempt, wholly fail to point out any section of the Kansas chattel mortgage law which provides for the making or recording of an assignment. The Kansas statutes relating to real estate mortgages, as we have already seen, are filled with provisions relating to the making and filing of assignments of real estate mortgages. The statutes of Kansas, in regard to the conveyances of real estate, contemplate the filing of record of all instruments in any wise affecting the title to real estate.

This sort of a provision is to be found in the statutes of most of the states, and in some of the states where there is no express provision for the filing and recording of assignments of real estate mortgages the Courts have held that a formal assignment of a real estate mortgage when duly acknowledged may be recorded as affecting the title to real estate, notwithstanding the absence of any specific provision for that purpose in the real estate mortgage law. And in those states the question at issue in this case has been discussed and decided upon the proposition that a purchaser of a note may file an assignment of his mortgage under the general provision of the law admitting of record all instruments affecting the title to real estate. But, while the Kansas real estate mortgage law is filled with provisions respecting the filing and acknowledgment and receiving of assignments of real estate mortgages, and while those statutes have been from time to time amended with a view of making them more perfect and complete, the Kansas legislature has industriously refrained from making any provision whatever looking to the filing or recording of assignments of chattel mortgages. The argument of counsel

of the Chicago Bank is that while the Kansas chattel mortgage law contains no provision in itself contemplating the making and recording of an assignment of a chattel mortgage, nevertheless that such assignment may be taken and filed because of the provision of the chattel mortgage law respecting the satisfaction of chattel mortgages. We do not think that the provision of the Kansas chattel mortgage law providing that chattel mortgages should be satisfied as near as may be in the mode and manner prescribed for the satisfaction of real estate mortgages was made with any regard to the question of the mode of making assignments. However, in this case the release and satisfaction were not made in the mode and manner prescribed by the real estate mortgage law of Kansas. The mode and manner of satisfying and discharging real estate mortgages in Kansas in 1900 and 1901 is clearly pointed out by Sections 4037 and 4038, page 838, of Dassler's General Statutes of Kansas for 1899.

Those sections read as follows:

> "Sec. 4037. Any mortgage of real property that has been or may hereafter be recorded may be discharged by an entry on the margin of the record thereon, signed by the mortgagee or his attorney, assignee or personal representative, acknowledging the satisfaction of the mortgage in the presence of the register of deeds or his deputy, who shall subscribe the same as a witness. A mortgage may be released by a receipt indorsed thereon, signed by the mortgagee, his agent or attorney, which receipt may be entered on the margin of the record, and shall have the same force and effect as the entry on the margin of the record, as provided in this section.
>
> "Sec. 4038. Any mortgage shall also be discharged upon the record thereof by the register of deeds whenever there shall be presented to him an instrument acknowledging the satisfaction of such

mortgage, executed by the mortgagee, his duly authorized attorney in fact, assignee, or personal representative, and duly acknowledged and certified, as other instruments affecting real estate."

Section 4037, above copied, clearly relates to a case where the mortgagee or his assignee personally appears in the office of the register of deeds and, in his presence acknowledges satisfaction of the record. Section 4038 is the section under which the release relied upon in this case was made, and that release is without any effect whatever by virtue of said Section 4038, for the reason that said release was never acknowledged, and not being acknowledged it was without effect and without any notice whatever to anybody. Neither the Cattle Loan Company or the Chicago Bank had any right to rely upon it. It results, therefore, that said release relied upon in this case by the Bank was without any effect whatever as against anybody.

The only decision in the Kansas Reports relied upon by the attorneys for the Chicago Bank to show that an assignment of a chattel mortgage may be recorded is the case of *Thomas* v. *Reynolds,* 29 Kan., 217. That was a case where the Court felt called upon to let out some man who was called upon to pay a penalty for not satisfying a mortgage. The Court was looking around to find reasons why the penalty sought to be enforced in that case should not be enforced. The case was wholly unlike the case at bar. The Court there assumed, without any argument or examination, that the chattel mortgage law contemplated assignments to be filed and recorded the same as the real estate mortgage law.

The Court there was not called upon to pass upon any such question as we have in this case; the distinct question was not there presented that we have in this case. But if that case should be construed as holding,

as contended for here, we say that it is not in harmony with three decisions of the Kansas Supreme Court, and it is not in harmony with the case of *Burhans* v. *Hutcheson,* 25 Kas., 625, where it was distinctly held by that Court that the Kansas real estate mortgage law respecting the filing of assignments of real estate mortgages have no relation or application to real estate mortgages given to secure negotiable paper. And of course if this was true as regards real estate mortgages given in Kansas to secure negotiable paper, then the same would be true of chattel mortgages given to secure negotiable paper, if we may concede for the sake of the argument that there is any statute in Kansas providing for the filing and recording of assignments of chattel mortgages in any case whatever. Said decision of *Thomas* v. *Reynolds,* if construed as contended for is also opposed to the case of *Wiscom* v. *Cubberly,* 51 Kas., 580. This last decision was given in 1893, and adjudges that:

> "Where an unsatisfied mortgage is released which was duly recorded and passed through the hands of several parties, and one of them to whom a written assignment of mortgage had been made, which was placed on record without acknowledgment, undertook to release the mortgage long after he had assigned it to another, and when the record did not formally show that he did not have authority to release the same, and subsequently another mortgage was executed by the owners upon the same real estate and accepted by the mortgagee in the belief that the first mortgage had been released. *Held,* that the subsequent mortgage was second and inferior to the first unsatisfied mortgage attempted to be released in the manner heretofore stated."

In that case Cubberly occupied the same position as the Geneseo Bank in this case, and Hutcheson the same position as the Siegel-Sanders Company, and Wiscom

occupied the same position as the Cattle Loan Company and the Chicago Bank in this case.

The Supreme Court, in its opinion in that case, used the following language:

> "If Hutcheson had had any right to execute a release, or if Wiscon or the Savings Bank had any right to rely on the release executed by Hutcheson, they might reasonably claim that their mortgage was superior to Cubberly's. When Hutcheson undertook to release the Cubberly mortgage he was not an owner of the mortgage nor an assignee with a right to release the same. Nearly four years before that time he had assigned and transferred the same to Cartwright. It is true that a mortgagee and probably an assignee who had assigned a note and mortgage may sometimes release the same so that a *bona fide* purchaser would take them free from the mortgage lien, although the note and mortgage are in the hands of the innocent purchaser and wholly unpaid, but before this can be done it must affirmatively *appear from the record that such mortgagee or assignee had authority to release.*"

In this case there is not a particle of evidence or any attempt to show that the Siegel-Sanders Company, after its transfer of the note and mortgage to the Geneseo Bank had any authority from the Geneseo Bank to satisfy its said note and mortgage. Said case of *Thomas* v. *Reynolds*, 29 Kas., 217, if construed as contended for by the counsel of the Chicago Bank, is also opposed to the decision given by the Kansas Court in the case of *Insurance Co.* v. *Huntington*, 57 Kas., 744. This case expressly approves the decision in *Burhans* v. *Hutcheson*, 25th Kas., 625, and holds that a transferee of a negotiable note is an assignee of a real estate mortgage who can satisfy the mortgage without recording a formal assignment. In that case, to which we have fully referred, it will be seen that there were several satisfactions as to different lots

covered by the mortgage made by the transferee of the note without any formal assignment of the mortgage being given, and the Kansas Supreme Court holds that those satisfactions by the transferee of the note were legal and proper. If that was true in that case, then it is also true as to the transferee of a negotiable note secured by chattel mortgage if, for the sake of the argument, it is conceded that there is in the chattel mortgage law any assignment in any case contemplated of a chattel mortgage.

We submit that those cases in the 25th, 51st and 57th Kansas Reports govern this case, and not the case relied upon by the Chicago Bank in the 29th Kansas, where the only question was one of penalty or forfeiture. The counsel of the Chicago Bank are compelled to rely alone at last on the case of *Lewis* v. *Kirk,* 28 Kas., 356. It may be freely admitted, as we do, that this case is opposed to the other three decisions of the Kansas Supreme Court in the 25th, 51st and 57th Kansas Reports. But said decisions of the Kansas Supreme Court in the two last reports are the latest judicial decisions of that Court and undoubtedly, in effect, overrule the case of *Lewis* v. *Kirk.* Besides, an examination of the decision of the Court in *Lewis* v. *Kirk* will show that Judge Valentine relied as the support of his decision in that case on the case of *Bailey* v. *Smith,* 14 Ohio. 396. Judge Valentine says, however, "the defendant justifies this doctrine above to the extent above suggested, and cited many authorities which seem to sustain his view of the case, among which is the case of *Bailey* v. *Smith,* 14 Ohio, 396, 405, seq." But this case of *Bailey* v. *Smith,* which was used as the principal reliance for the opinion in the case of *Lewis* v. *Kirk,* was expressly disapproved by this Court in the leading case of *Carpenter* v. *Longan,* 16 Wallace, 275. Said case of *Lewis* v. *Kirk* is not in harmony either

with the three other cases cited from the Kansas Supreme Court, nor is it in harmony with the said decision of this court, nor with the decision of the United States Circuit Court of Appeals in the recent case of *Swift* v. *Bank of Washington, supra.*

In each one of the Illinois cases cited by the Chicago Bank in its brief there was an ordinary trust deed made by the debtor to a third party as trustee to secure the payment of a note held by another party, and in those cases the trustee was expressly empowered not only to sell but to enter satisfaction where the note should be held by the payee or his indorsee, and in those cases the legal title was conveyed to the trustee to enable him to execute the trust.

Of course those cases are not like the case at bar. We submit that in the case at bar under the Kansas Statutes the original mortgagee of a chattel mortgage after transfer by him of the negotiable promissory notes secured by the mortgage possesses no power either to satisfy the mortgage or to recover in an action of replevin the property mortgaged or to sue in trover where the property is converted. Under the Kansas chattel mortgage laws the rights, duties and powers of the original mortgagee all pass to the transferee of the note secured by the original mortgage.

In the case of *Mann* v. *Jummell,* 183 Ill., 538, which is one of the cases cited by counsel of the Chicago Bank, the trustee who released had the legal title to the land and was empowered to release by the trust deed. It was held in that case by the Illinois Supreme Court that the assignee of the note could have procured and recorded a formal assignment of the note and trust deed. In that case the assignee allowed the indebtedness to run five years after it became due.

The case of *Lenartz* v. *Quilty,* 191 Ill., 174, which is also cited by counsel for the Chicago Bank, is the same

as said case of *Mann* v. *Jummell.* In the case of *Davy* v. *Brenton,* 102 Iowa, 482, which was also cited by the Chicago Bank, the release was given by the trustee in a trust deed who was especially empowered by the deed to satisfy or release the same. In the case at bar the Kansas chattel mortgage statutes, contemplate that where the chattel mortgage has been assigned, the satisfaction or release must be made or given by the assignee and not by the original mortgagee. Sections 4068 and 4069 of the Kansas mortgage law of 1899, clearly contemplate that after default where the chattel mortgage has been assigned, the assignee of the note and not the mortgagee is the only person who can enforce the mortgage and sell the mortgaged chattels and sue in replevin and trover.

Bohart v. *Buckingham,* 62 Kas., 658. This is the section which contained the words "mortgagee or his assignee." And those sections should be construed *"in pari materia,"* with section 4067, of the same statute, which provides for the satisfaction of Kansas chattel mortgages to be made by the "mortgagee or his assignee."

In Texas, where *Henderson* v. *Pilgrim,* which is also cited by the counsel of the Chicago Bank, was decided, it was held that an assignee of a mortgage may take and record a formal assignment. Of course it goes without saying that if there is no law for the making and recording of an assignment of a chattel mortgage it would be without effect and would not be notice to anybody, although made and recorded.

The case of *Williams* v. *Jackson,* 107 U. S., 478, and *Townsend* v. *Little,* 109 U. S., 504, which are cited in the brief of the Chicago Bank are similar to the Illinois cases also cited by the Chicago Bank, to which we have already referred. Said cases of *Williams* v. *Jackson,* and *Townsend* v. *Little,* were both cases of trust deeds in which

power was actually given to the trustee coupled with the legal title of the real estate conveyed and fully empowering the trustee to satisfy the trust deeds whether the mortgage notes are held by the original *cestui que* trust or his indorsee.

The Indiana cases cited by the [illegible] Bank in its brief were all decided since the Act of July 2nd, 1877, of that state, which expressly provided for the recording of assignments of mortgages.

The case of *Porter* v. *Ourada*, 71 N. W., 52, cited by the Chicago Bank, is not in point. That case cites the decision of the Supreme Court of Nebraska in the case of *Whipple* v. *Fowler*, 41 Neb., 675-685-686. We invite the special attention of the Court in this case to said decision of *Whipple* v. *Fowler*. In that case it was held that the fact of the subsequent mortgagee having taken and purchased his mortgage prior to the maturity of the prior mortgage, prevented the subsequent mortgagee from being an innocent purchaser because of his purchase prior to the maturity of the other mortgage. In the case at bar the Chicago Cattle Loan Company took its note and mortgage in October, 1900, which was prior to the maturity of the debt and mortgage of the Geneseo Bank which matured on November 1st, 1900. See also on this point the case of *Matthew* v. *Jones*, 47 Neb., 616-624. It may be said generally of each and all of the cases cited by counsel for the Chicago Bank that there was a law as construed by the Court authorizing and permitting the making and recording of an assignment of the mortgage at the time of the transfer of the note. As we have seen that was not permissible in this case under the chattel mortgage laws of Kansas. Therefore, it cannot be said in this case that the Geneseo Bank was guilty of any negligence whatever; it did everything it could do at the time and after it bought its note and mortgage. It never had

any knowledge, actual or constructive, of the filing of the release or of the giving or recording of the renewal mortgages given and held by the Cattle Loan Company and the Chicago Bank. The time had not arrived when this suit was brought for the filing of the affidavit during the last thirty days of the year. And the Geneseo Bank having foreclosed its mortgage by taking possession of the cattle prior to the arrival of said thirty days, it results that the Geneseo Bank had done everything that the law required it to do, or that it could possibly do to protect its right. We agree with the learned counsel of the Chicago Bank that where one of two innocent parties in a case must suffer, the loss must fall upon that one of the two parties who has made it possible for the fraud to be committed by the third party. That was done in this case by the Chicago Cattle Company trusting the Siegel-Sanders Company. The Cattle Loan Company and the Chicago Bank made it possible for the Siegel-Sanders Company to commit a fraud by accepting the second and third renewals of October, 1900, and April, 1901, without making further inquiry and accepting their attempted release as representing the note holder. Therefore, applying that maxim to this case, the loss in this case ought to fall on the Cattle Loan Company and the Chicago Bank which made the fraud possible, and not upon the Geneseo Bank, which has not omitted anything, and has not done anything to enable the Siegel-Sanders Company to defraud anybody.

VII.

We will here make some suggestions in regard to the authorities and remarks in the brief of plaintiff in error. Nearly all of the cases cited by the learned counsel for plaintiff in error were cases of real estate mortgages. As

we have seen, there is a very different policy in regard to the transfer of real estate and personal property titles.

Real estate titles and interests are ordinarily evidenced by instruments of writing recorded with the Register of Deeds—not so with personal property. The transmission of personal property titles, and interests in personal property, is not ordinarily clogged by provisions of law requiring the registering of instruments affecting them. Instruments affecting those titles are not required to be recorded, and parties may ordinarily convey without the registration or recording of instruments of writing.

We have already noticed the larger part of the cases cited by plaintiff in error. The case of *Ferguson* v. *Blatchford,* decided by the Supreme Court of Michigan, 35 N. W., 820, and cited by counsel, was a case of a real estate mortgage. That was a case, however, where the discharge of the mortgage had been made by a party authorized to make it, but the discharge had been made through mistake, and the question there was whether a discharge of a mortgage made by a party who had the power to discharge it, by mistake, could be set aside as against innocent third parties,—an entirely different question from the one we are dealing with in this case.

The case of *Morris* v. *Beecher,* 45 N. W., 696, which was decided by the Supreme Court of North Dakota and cited by counsel, is not in point. In that case the mortgage was never recorded, having been lost. That was also a mortgage on land.

Another case cited by counsel for plaintiff in error is *Jenks* v. *Shaw,* 68 N. W., 900, which was decided by the Supreme Court of Iowa. That was also a real estate mortgage. In that state there is a provision that all instruments of writing affecting, either in law or in equity, title to real estate, must in order to have effect as against subsequent purchasers, be recorded, and under that statute

as construed by the Iowa Supreme Court, it was permissible for the transferee of a real estate mortgage note to register his assignment, which was not done in that case.

The case of *Purdy* v. *Huntington*, 42 N. Y., 334, which is cited by counsel, seems to us to be more of an authority in favor of defendant in error than in favor of the plaintiff in error. In the opinion of the New York Court of Appeals in that case, delivered by Judge Lott, it is said:

> "It is to be conceded that he is to be charged "with constructive notice of the existence of the "mortgage, and of the continuance of its lien, by its "record in the proper office. By that he was in- "formed not only of the date of the mortgage, the "amount secured thereby, and all of its particulars, "but that it was open and uncancelled of record, and "therefore apparently an outstanding lien and in- "cumbrance on the premises of which he was taking "title. Having that information, he knew or at least "was chargeable at law with the further notice, "that it was such a lien and encumbrance in the "hands of any person to whom it had been legally "transferred, and that the record of such transfer "was not necessary to its validity, nor as a protection "against a purchaser of the property mortgaged "or any other person than a subsequent purchaser in "good faith of the mortgage itself or the bond or "debt secured thereby; but on the contrary that a "vendee of the premises took it subject to the lien "of the mortgage irrespective of the ownership there- "of. *That knowledge and notice made it his duty "in the exercise of proper diligence, to inquire "whether Minott Mitchell, his vendor, was still the "owner and holder of the mortgage, and his omis- "sion to make that inquiry deprives him of the pro- "tection of a bona fide purchaser.*"

The case of *VanKeuren* v. *Corkins*, 66 N. Y., 77, which is also cited by counsel, is in conflict with the decision of this Court in *Carpenter* v. *Longan*, 16 Wall.,

271, and is also in conflict with the decision of this Court in the case of *Ward* v. *Smith*, 7 Wall., 447.

The case of *Drumm-Flato Commission Co.* v. *Barnard*, 66 Kas., 568, which is also cited by counsel for plaintiff in error, is not in point. In that case the plaintiff delivered a release of a portion of the property covered by plaintiff's chattel mortgage, directly to the agent of defendant who had bought that mortgaged chattel property from the mortgagor. The defendant, Barnard, was the purchaser, and the question in that case was whether the release given by the plaintiff to the defendant, Barnard, constituted an estoppel. Of course it is evident from this statement of the case that no question of the sufficiency of the registration of the release arose for decision of the Court. There was no occasion for setting out the acknowledgment to the release in that case, if it was acknowledged, and the only point was whether the operative language of the release itself created an estoppel for more cattle than were named in the release. The point as to whether an unacknowledged release was an instrument proper to be recorded, was not made, and did not arise in the case. There was no occasion for the discussion or decision of any such question, and it was not presented by counsel or decided by the Court.

At the bottom of page 12 and the top of page 13 of the brief and argument for plaintiff in error, it is practically conceded that the statute of Kansas does not in terms require or permit the recording of an assignment of a chattel mortgage. And at page 13 of counsel's brief, an authority from Jones on Mortgages is cited. That citation is from the work on mortgages of real estate, and not mortgages of chattels. The work of Jones on Mortgages has relation, as is well known, to mortgages on real estate. Jones has a separate work on chattel mortgages.

What is said in that citation, by Jones, has relation to the policy in various states in regard to the assignment of real estate mortgages.

We have already cited in this brief, Section 663 of Jones on Chattel Mortgages, which points out very clearly and distinctly the distinction between the policy of the various states regarding the assignments of real estate mortgages and the policy regarding the assignments of chattel mortgages.

At page 42 of the brief of counsel for plaintiff in error, it is suggested that the record does not afford constructive notice in this case to the Chicago Bank of the title of the Geneseo Bank. We have endeavored, at several points in the foregoing brief and argument, to answer that point. The Chicago Bank was bound to take notice in October, 1900, when it bought its notes and mortgages, that the mortgage under which the Geneseo Bank claimed was still of record and unsatisfied. It dealt with respect to the notes and mortgage of the Siegel-Sanders Live Stock Commission Co. without making any inquiry as to whether that Company had assigned to the Geneseo Bank the notes held by that bank. Inasmuch as by a simple inquiry put by the bank to the Siegel-Sanders Live Stock Commission Company in October, 1900, it would have ascertained that the Geneseo Bank's note was held by that bank, we submit, in view of the authorities heretofore cited and considerations heretofore presented, that the Chicago Bank must be held to have purchased with notice that that note was or might be outstanding. A fact which the Chicago Bank could have ascertained by inquiry from the Siegel-Sanders Live Stock Commission Co., must be taken the same as having been known by the Chicago Bank.

At the bottom of page 46 and on page 47 of the brief and argument of counsel for plaintiff in error, an

extract is made from the testimony of one Thornton W. Sargent. If the entire testimony of Mr. Sargent had been set out instead of mere extracts therefrom, it would have appeared that he gave a very different version of the law as he understood it, from that inferred from what is cited by counsel. Thus, at page 106 of the printed record Mr. Sargent testified as follows:

> Q. You have stated, Mr. Sargent, that if such a release was signed by the mortgagee, that the mortgage would be released, regardless of who owned it or who controlled it or who was interested in it? A. Yes, sir, that would under some qualifications, of course.
>
> Q. Give us the qualifications? A. That release would be good as against the parties.
>
> Q. What parties do you mean? A. I mean it would be a good release of a mortgage as between the mortgagor and the mortgagee.
>
> Q. How about an assignee? A. Do you mean a subsequent assignee, or prior assignee?
>
> Q. I mean an assignee of a chattel mortgage; we are talking about the assignee of a chattel mortgage, the owner of the note at the time it was released, the assignee of the note? A. The assignee of a non-negotiable instrument, the release would be good as to him.
>
> Q. How about the assignee of a negotiable instrument? A. As between the mortgagee and the assignee of a negotiable instrument secured by chattel mortgage, the release would not be good, in my judgment.

The opinion given by Mr. Sargent and quoted at page 47 of the brief of counsel, that a release of a mortgage in Kansas is good when recorded as against third parties, although the release is not acknowledged, is contrary, as we have seen, to the express statutory provisions of Kansas, and is therefore without any force whatever.

At pages 51-52 of the brief of counsel for plaintiff in error, the assumption is bodly made that the Chicago Bank in this case, on the facts, is a subsequent innocent purchaser for value without notice. We have already in our brief and argument covered this point. The simple fact is that the Chicago Bank bought, with the loan company, the notes and mortgages held by the Chicago Bank in the Chicago office of the Siegel-Sanders Commission Company in October, 1900, and while the mortgage held by the Geneseo Bank was still on record and a month before the making and recording of the release.

The testimony of Mr. Swain who was in charge of the Chicago office, of the Siegel-Sanders Live Stock Commission Company (p. 45, printed Record), shows that the Chicago Bank obtained title by its purchase of its notes and mortgage from him without any reference to or examination of what was on record in Clark County, Kansas, respecting the mortgaged cattle.

Mr. Doud also testified that this transaction of the purchase in Chicago was in October or the early part of November, 1900 (p. 91, Record).

The plaintiff did not have any knowledge of the release which was recorded a month after its purchase of these notes and mortgage, until it sent out its agent, Mr. True, who found the release, and first learned of the fact of the release in February, 1901. According to the testimony of the witness, True (p. 83, Record), the fact is indisputable that the purchase of these notes and mortgage held by the Chicago Bank in October, 1900, was, prior to the discovery of the release by him in February, 1901, and this also appears explicitly from the remarks of Mr. Strawn, one of the counsel of the plaintiff in error, in his opening statement in the trial court and which is to be found at page 40 of the printed record. Those remarks of Mr. Strawn in his opening statement, are as follows:

"I might say by way of history, and it will also come out in the evidence, that the Chicago Cattle Loan Company is a corporation, organized under the laws of West Virginia, having its office and principal place of business at Chicago, and that the offices of the Chicago Cattle Loan Company are also the offices of the National Live Stock Bank of Chicago, the plaintiff; that in the month of February, 1901, the Chicago Cattle Loan Company and the plaintiff Bank,—the Cattle Loan Company at that time, owning the mortgage which we claim was a first mortgage on the cattle, sent a representative to Ashland, Kansas, to examine the records."

In this statement Mr. Strawn had reference to the witness, True, who went out in February, 1901, and found this release for the first time, four months after the parties had bought the notes and mortgages relied upon.

Again, at the bottom of page 86 and the top of page 87 of the printed record, appears the following statement of Mr. Strawn:

"By Mr. Strawn: This loan under which Mr. Young claims was made on June 27, 1900.

By the Court: Under which you claim?

By Mr. Strawn: No, under which the First National Bank of Geneseo, the defendant, claims, under a loan secured by a mortgage bearing date June 27, 1900.

By the Court: Yes, sir.

By Mr. Strawn: Which expired by its terms November 1, 1900, and which was released as per this release we have introduced in evidence, November 27, 1900. Subsequent to that and on October 17, there was a new mortgage made which the Cattle Loan Company had for $14,000, and that was the mortgage which Mr. True went there at the time to investigate, and subsequently, and on the 17th day of April, 1901, our mortgage was executed, under which we claim in this suit.

By the Court: I thought Mr. True was representing your mortgage.

By Mr. Strawn: He does, he says he represents the Cattle Loan Company and the National Live Stock Bank, both. I will prove by him that their offices were together, and that we went there in February to examine the security pledged to the Chicago Cattle Loan Company by this mortgage which bore date October 17, 1900. That mortgage came due in April, 1901, and was renewed or a new mortgage given in place of it, which is the mortgage which we claim under in this suit and the mortgage which we claim under bears date about April 17, 1901.

By the Court: Then it was a second mortgage, that is, was a renewal mortgage of a previous debt?

By Mr. Strawn: Yes, sir. Our theory in this case is that with that mortgage.

By the Court: I am not caring about the theory; I want the facts. What I first suggested was the point that Mr. True was investigating a loan already made.

By Mr. Strawn: Yes, sir."

These quotations and suggestions, with what we have already heretofore said in this brief and argument, demonstrate, as it seems to us, that the assumption and claim of the Chicago Bank being an innocent subsequent purchaser for value without notice, upon the faith of the recorded release, is without any support whatever.

In this connection, at the bottom of page 51 and top of page 52 of the brief and argument of counsel, it is said:

"If the Geneseo Bank had expended one dollar "for recording and a two-cent stamp for mailing "the mortgage to the Register at Ashland, it would "have saved the litigation covering a period of five "years, causing great loss to both litigants."

As we have already seen, the Geneseo Bank had no right or authority under the Kansas chattel mortgage laws to record an assignment of the purchase of its note and mortgage. Following the above language, the counsel said: "And still it left it in the power of that Commission Company to swindle somebody." Nothing could be more erroneous than this suggestion. The Commission Company did not represent the assignee of the note. The Chicago Bank bought its note and mortgage in Chicago in October, 1900, without any knowledge of the release which was made a month thereafter, and it cannot be said, in view of the facts of this case, that the Chicago Bank was swindled by anybody. The Geneseo Bank did not leave it in the power of the Commission Company, or anybody else, to swindle the Chicago Bank, or any other person. The Chicago Bank knew full well that the Commission Company did not represent the assignee of the note secured by the first mortgage, and as we have seen, if the Chicago Bank had made inquiry of the Commission Company it must have ascertained that the Commission Company did not have the note. If it did not have and could not produce the note, then it did not have power to satisfy the mortgage.

At page 52, counsel said:

> "It is a weak argument and contrary to the "spirit of the laws of Kansas or of any other com- "munity, which says that a secret assignment of a "note carries with it a chattel mortgage on hundreds "of cattle without a scratch of a pen, as against a "*bona fide* purchaser, without notice, who walked up "and paid out his money on the faith of a public "record whose proclamation to the world was con- "trary to the terms of the secret."

The learned counsel who made the above suggestion must have had some other case in mind, and not the case at bar. The Chicago Bank in no sense was an innocent *bona fide* purchaser, without notice, and did not, as